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THERE IS GREAT NEED in London of barristers, solicitors, and students who would be prepared on not more than one night a week to give free legal advice to poor people at Cambridge House, Camberwell, and similar institutions, where essential help is provided for people who have no other means of obtaining opinion or redress. The work is intensely practical and is limited to advising.

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It is regretted that the exigencies of the war have reduced the space available for book reviews and made it necessary to give no more than short notices of some of the works received for review.

PRECEDENTS*

THE RIGHT HON. LORD WRIGHT

IT may seem odd at a crisis like this in the history of the empire and of mankind to be thinking and writing of academic questions of law, but the Editor has asked me to contribute an article to the *University of Toronto Law Journal* as a token of the sympathy and fellow-feeling of lawyers on both sides of the Atlantic. I am glad to be able to comply with his request and I do so also as a token of appreciation of the noble efforts that Canada is making for the cause which is so dear to the hearts of all of us. What Canada is doing is also being done by the other sister nations of the empire—the great Dominions—the colonies and India. All are united not by material or formal bonds, but by ties of kindred and by a common devotion to the cause of the free spirit and dignity of man, of the supremacy of law over tyranny, treachery, and brute force. The common law which binds together the English-speaking countries has been well called the law of the free peoples. We are confident that the forces of evil are ephemeral compared with that law. We can without impropriety forget for a brief space the pressing evils and dwell a little on that which will survive them, the common law.

I use the word common law to connote our whole system of law in all its branches, in the full amplitude of its geographical extension over all the continents, disregarding minor differences due to different statutes in different parts, to differences in local usage, and to occasional differences in judicial interpretation. There is the underlying unity of idea and purpose which dwarfs these minor differences. I look for the essence of our law not in form but in substance. In the days of the forms of action, now happily no more, it used to be said that the substance of the law was the law of remedies. We are now agreed that the substance of law is to do justice between man and man, or perhaps between person and person; sometimes justice has to be done between men, sometimes between men and the king or state. It is in this proud spirit that the common law has defied both the frown of the tyrant and the clamour of the misguided populace.

The word ' law,' however, necessarily implies generality and uniformity, which can operate only in practice by some method and mechanism. What I hope to discuss in this study is the method of precedents, which is the characteristic and all-pervading method of the common law, for better or worse. It has been qualified in increasing measure during recent decades by statutes which overrule or modify the rules set up by judicial

* This article was first published in the *Toronto Law Journal*, Vol. IV (1942). In view of its general importance, Lord Wright has kindly consented to its republication here, and Professor W. P. M. Kennedy, the editor of the *Toronto Law Journal* has very courteously given his permission to the reprinting of it.—ED. *C.L.J.*

precedents, because parliament is predominant. Large areas which had been occupied by judge-made law have been taken over by statutes. It may be that a system of precedents is merely a phase in the evolution towards a complete system of law declared by some competent and accepted authority. Maitland in one of his essays envisaged such a code or series of codes in which the whole content of the law had been worked over, reconsidered, and restated so that modern problems of law might be met by modern methods.[1] To some extent and in special fields something of the sort has been done by the great Property Acts of 1925. An earlier instance which was in the field of procedure is furnished by the Judicature Act, 1873, and its precursors the Common Law Procedure Acts and the Chancery Procedure Acts. There has been consolidation or codification of certain branches of law, some of a very technical character, such as rating and poor law and also many most important branches of commercial law. Remedial and social security legislation has practically taken possession of regions once solely occupied by the common law, such as compensation to workmen, or has cultivated regions left derelict by the common law. But all these statutes must, except in so far as these functions are entrusted to administrative tribunals, be construed and applied by the Courts and the Courts apply the method of precedent. Still, however, most important branches of law, including some which affect the daily life and dealings of the population at large, such as contract, agency, quasi-contract, tort, etc., are still left to judge-made law with some inter-mixture of statutory modifications in detail. Even the criminal law has not yet been codified, though in part it is embodied in statutes. There is thus an enormous scope for the method of precedents.

I am not going to say that this method is perfect. Its obvious limitations and drawbacks have often been dwelt on. But with a purely empirical system of law, such as ours is and has been, no other method was possible. To lawyers of my generation, it seems second nature, indeed in its own sphere first and only nature. Before I examine it more closely I want to make a distinction. A system of precedents may connote two closely allied but essentially different ideas. One is that a judge in deciding the case before him should have regard to, but is not bound by, earlier decisions on more or less similar facts. The other is that precedents definitely fix the law applicable to the same or analogous facts at least so far as they go. The former idea considers the precedents as helps to a decision, just as the judge would seek help from any available source such as books of authority, if there are any such text-books or theoretical discussions, minority opinions in our own Courts, decisions of Courts other than English, especially those of the United States, Scotland, and the Dominions or colonies. But on this view these precedents do not bind the judge; they are his helpers not his masters,

[1] *Collected Papers* (Cambridge, 1911), Vol. III, at pp. 435 *ff.*

their effect is persuasive not coercive. On the other view, the precedents are authoritative and binding. As their functions are more august, their definition is strict and their range is narrow and limited. So far as they go, they are the law. On the strict theory, a decision of the House of Lords is according to its true scope and interpretation, its *ratio decidendi*, as much the law of the land as a section of an Act of Parliament and can be changed only in the same way as the latter can be changed, that is by an Act of the Legislature. So important a potency necessarily calls for a strict definition of the content of the precedent. When one sees an Act of Parliament, the law-making material is clearly to be seen even if it is difficult to understand it. But when one looks at a decision of the House of Lords, it is not always so easy, perhaps not easy at all, to see what precisely is the law which it makes. Yet that definition, however difficult, is essential if the law is to be ascertained. The same difficulties arise in determining what binding precedents can be drawn from decisions of the lower Courts according to their hierarchy reaching to the House of Lords. The comprehension and use of precedents so understood, are indeed difficult arts. The failures of judges in these matters are written large in the pages of the reports.

I am not here concerned with historical questions, because my object is to ascertain what to-day is the positive law and how far it functions in enabling the Courts to promote justice and the public well-being. I shall only say that until about 1860 there was some doubt whether the decisions of the House of Lords were binding upon itself. In the *Attorney-General* v. *Dean and Canons of Windsor*,[2] in 1860, Lord Campbell L.C. categorically laid down that a decision of the House of Lords is as binding upon the House as on any inferior Court. Lord Kingsdown reserved his opinion, as that point was not necessary to the decision on the appeal. The Master of the Rolls in the Court below had expressed the opinion that the decisions of the House of Lords were binding on all Courts except itself. Lord Campbell's language repudiating that view is significant. He said:—

> By the constitution of this United Kingdom, the House of Lords is the Court of Appeal in the last resort, and its decisions are authoritative and conclusive declarations of the existing state of the law, and are binding upon itself sitting judicially, as much as upon all inferior tribunals. The observations made by Members of the House whether law members or lay members beyond the *ratio decidendi* which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed as far as they may be considered agreeable to sound reason and to prior authorities. But the doctrine on which the judgment of the House is founded must be universally taken for law, and can only be altered by Act of Parliament.[3]

He reiterated this opinion in *Beamish* v. *Beamish*,[4] in 1861. In that case the binding effect of the decision in *Regina* v. *Millis*[5] was accepted, though the affirmance of the judgment under appeal was only arrived at

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[2] (1860) 8 H. L. C. 369.
[3] At pp. 391-2.
[4] (1861) 9 H. L. C. 274,
[5] (1844) 10 Cl. & F. 534,

by the technical rule of the House which applies where, upon a division, the numbers are equal, that the judgment of the Court below stands. Lord Campbell had disapproved the decision in *Regina* v. *Millis*, but in *Beamish* v. *Beamish*, he said:—

> But it is my duty to say that your Lordships are bound by this decision as much as if it had been pronounced *nemine dissentiente*, and that the rule of law which your Lordships lay down as the ground of your judgment, sitting judicially, as the last and supreme Court of Appeal for this empire, must be taken for law till altered by an Act of Parliament, agreed to by the Commons and the Crown, as well as by your Lordships. The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals, and on all the rest of the King's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law and legislating by its own separate authority.[6]

Lord Campbell's reference to 'this empire' and to all the rest of the Queen's subjects will need to be considered when the question is raised as to the relation between decisions of the House of Lords on the one hand and decisions of the Privy Council and Dominion Courts on the other. But at this stage I emphasize that the justification of the rule is, according to Lord Campbell, purely constitutional, and is not explicitly based on any consideration of utility or public welfare or on any ground save constitutional logic. And I also emphasize that Lord Campbell is careful to distinguish the *ratio decidendi*, the rule of law laid down as the ground of the judgment, from observations of members of the House beyond the *ratio decidendi*. This is a vital distinction sometimes overlooked, as I shall show. Lord Wensleydale, Lord Cranworth, and Lord Chelmsford took the same view and the House went on to consider, on the assumption that *Regina* v. *Millis* was conclusive, the further point which was raised whether the presence of the clergyman who was himself a party to the marriage would satisfy the requirements of *Regina* v. *Millis*. The House decided it would not. Such then is the modern English rule which could be changed only by Act of the Legislature. But it leaves open in any later case in which the rule is invoked the questions, often difficult, what is the *ratio decidendi*, or rule of law on which the decision is founded, and what is the exact extent of the decision. Lord St. Leonards had, however, maintained the contrary view in more than one case. Thus in *Bright* v. *Hutton*, in 1852, when he was Lord Chancellor, he stated as his opinion in addressing the House, 'although you are bound by your own decisions as much as any Court would be bound, so that you could not reverse your own decision in a particular case, yet you are not bound by any rule of law which you may lay down, if upon a subsequent occasion you should find occasion to differ from that rule; that is, that this House like every Court of Justice, possesses an inherent power to correct an error into which it may have fallen.'[7] Here Lord St. Leonards does not accept the constitutional rule propounded by Lord Campbell, but enumerates the less rigid theory of precedents

[6] (1861) 9 H. L. C. 274, at pp. 338-9.

[7] (1852) 3 H. L. C. 341, at p. 388.

which would make them not coercive, but merely persuasive in the House of Lords. But Lord St. Leonards was a voice crying in the wilderness. Lord Campbell's opinion prevailed. It was again positively reaffirmed by the House of Lords in *London Street Tramways Co., Ltd.* v. *London County Council.* Lord Halsbury L.C. justified the rule on a different ground, on the pragmatic ground of practical convenience. 'What,' he said, 'is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal.'[8] He quoted the maxim *interest reipublicae* that there should be *finis litium* at some time, and applied that maxim to the finality of a decision on a point of law by the House of Lords. The maxim, however, is generally applied to what is called *res judicata*, that is, a decision on particular facts which is binding as between the parties to the *lis*, from which there is no appeal. It is a very different matter to say that a rule of law once laid down by the House of Lords cannot be corrected by the House. Indeed Lord Halsbury concedes[9] that it might be corrected in a particular case where it is shown that the house had omitted to notice an act of Parliament or had acted upon an Act of Parliament which had been repealed. The House then would not be bound because that would be a case of a mistake of fact. But it may be asked whether the same principle would not apply if the House had acted in ignorance of a decision of the House not brought to its notice, or on a mistaken view of legal history, or, to go a step farther, on a mistaken or obsolete view in social or economic matters. No doubt the particular case in which the mistake of law occurred could not be reopened. The maxim *finis litium* or the principle of *res judicata* prevents this. But the continuance of a general rule, recognized to be erroneous, is a very different matter. *Regina* v. *Millis* and *Beamish* v. *Beamish* dealt with vital matters of marriage and family life. Can anyone doubt that on balance of social convenience and public welfare it would have been better to have refused to perpetuate the erroneous and unjust rule? An occasional re-argument of the rule is a small matter compared with the persistent operation of injustice. A mistake of law should be as good a ground for reconsidering an earlier decision as a mistake of fact. However, the rule is fully established. In a very recent case, *Radcliffe* v. *Ribble Motor Services, Ltd.*,[10] the House of Lords were asked to reconsider and depart from the rule generally described as the doctrine of common employment which had been laid down by the House of Lords in *Bartonshill Coal Co.* v. *Reid.*[11] Their Lordships were invited to say that the rule was based on social and industrial conditions that had changed and that it was the duty of the common law to mould and adapt itself from time to time so as to do justice under new and changing conditions. It might

[8] [1898] A. C. 375, at p. 380.
[9] At pp. 380-1.
[10] [1939] A. C. 215.
[11] (1858) 3 Macq. 266.

be well if that were so, but the House refused on the ground that the House was bound by its own decision. As things stood no other view was possible, though all their Lordships were of opinion that the rule was illogical. Lord Atkin said of the judgment enunciating the rule, 'It proceeds on a fallacious proposition from first to last—namely, that the doctrine of *respondeat superior* only applies to strangers.'[12] As the old Scots judge long since observed, if *respondeat superior* operates in favour of strangers, it ought *a fortiori* to operate in favour of an employer's own men. But the common employment doctrine was based on a false and inhuman social and industrial theory of *laissez-faire*, and the cheapest market for labour, the theory that wealth (*sc.* of employers) must accumulate though men decay. The House of Lords held themselves bound, but they were able by a scrutiny of the earlier decision of the House of Lords to hold in the case before them that it fell outside the main rule and came within a qualification to which the Court of Appeal had not given effect. Even more recently in a revenue case of purely technical interest, *Cull* v. *Inland Revenue Commissioners*,[13] the House refused to entertain any question as to the correctness of an earlier decision of the House, once it became clear that the earlier decision was based on the construction of the relevant words of the statute and did not depend on the special facts of that case. The house accordingly on that ground alone reversed the decision of the judgment of the Court of Appeal who had held that the *ratio decidendi* of the earlier case was limited to a judgment on the particular facts. But it is not necessary to multiply instances in which the House has acted upon this now settled rule of conduct.

This makes it the more important to determine as exactly as possible what the rule means and to illustrate how it operates. Lord Halsbury in one case[14] observed that 'a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.' In the same volume of the reports, in *Keighley, Maxsted & Co.* v. *Durant*, Lord Halsbury said in rejecting an alleged parallelism (fallacious it is true): 'If it is said it [*sc.* to deny the parallelism] is an anomaly, it certainly is not the only one in our law, and if it were sought to make our laws harmonious by deciding that any proposition which our laws establish involves as a necessary consequence the establishment of everything that is analogous to it, the result would be perplexing indeed.'[15] It would, however, be wrong to construe these observations too literally. In *Quinn* v. *Leathem*,[16] Lord Halsbury warns us that the generality of expressions used in a judgment is not intended to be an exposition of the whole law, but is

[12] [1939] A. C. 215, at p. 228.
[13] [1940] A. C. 51.
[14] [1901] A. C. 495, at p. 506.
[15] [1901] A. C. 244.
[16] [1901] A. C. 495, at p. 506.

governed and qualified by the particular facts of the case in which such expressions are used. In *Quinn* v. *Leathem*, Lord Halsbury was concerned to distinguish from the case before him the apparently analogous case of *Allen* v. *Flood*,[17] and in *Keighley, Maxsted's Case* he was protesting against a false analogy. The language I have quoted, if literally understood, would be fatal to any system of precedents. It is true that our law has many real, not merely apparent, anomalies, but that is its defect and its failure to live up to its ideal. It is a defect for which careful revision of the cases and their correction either by higher Courts or the legislature ought to find a remedy and will no doubt do so in time, not by applying a narrow or formal logic, but by the truer logic of moulding the rules to the exigencies of life and social needs. Nor is it right to say in general terms that a judgment is only an authority for what it decides. A judgment in itself as such is not an authority at all save in so far as it constitutes an estoppel between the actual parties. The authority, if any, is the *ratio decidendi*, the general rule which it embodies.

Nor is it true to say, as is often said, that English law is inductive. If all that is meant by these words is that it does not possess a universal code or institutional book or books of authority in which the rules can be found, so that all the law has to do is to deduce from the appropriate rule the necessary consequence, the term, though open to misunderstanding and inaccurate, may do no harm, though it can do no good. But the antithesis between induction and deduction is false. The law has to make the particular rule by a process which may not very accurately be called induction; it may make the rule on the basis of considering a particular instance, by applying its standard of moral and social values and of justice. It may, then, in the same case apply that rule to the particular facts and deduce the consequent conclusion. That must be so where there is a question not governed by any existing rule, where the case is one of what is called 'first impression.' Such a rule, if finally established, forms a precedent which can, or rather must, be applied where applicable in later cases. This latter process may be called deduction. In the earlier case in which the rule was established there were both induction and deduction. But I do not like the terms, because their use seems to disguise the contrast between law as concerned with rules of life and as normative, with science, which works with objective facts and theories. Law accepts the common-sense view of the world and takes things as being what they appear to the men who have to live among them and with each other. Its purpose is to regulate man's conduct in relation to external things and persons, not merely to ascertain and explain what happens in fact.

Lord Sumner in *Sinclair* v. *Brougham*[18] states what he regards as the duty of a judge where there is no direct authority. The Court was required to direct a liquidator how to dispose of the surplus assets remain-

[17] [1898] A. C. 1.

[18] [1914] A. C. 398.

ing after all outside liabilities had been discharged. The issue was between the shareholders in a building society and those who had deposited money with the society. The business of the society was a banking business which it had carried on, but which was *ultra vires*. Lord Sumner, having said that the case must be decided on equitable principles on which there was no direct authority, thus stated his conclusion:

> The question is one of administration. The liquidator, an officer of the Court, who has to discharge himself of the assets that have come to his hands, asks for directions, and, after hearing all parties concerned, the Court has the right and the duty to direct him how to distribute all the assets. No part of them can remain undistributed as *res nullius*. No one has ventured to argue before your Lordships that the shareholders take everything, to the exclusion of the depositors, and so make a huge windfall. *In my opinion, if precedent fails, the most just distribution of the whole must be directed, so only that no recognised rule of law or equity be disregarded.* In this case neither the shareholders nor the depositors have the better equity; the money of each has, with the consent of all, been indiscriminately applied in acquiring assets beyond as well as within the society's powers, the former in much the larger measure. The claims of each class are equal and, I think, for the present purposes identical.[19]

I have italicized what I think is the most important sentence from the view point of this article. There are three essential steps: (i) there is no precedent, that is, no direct precedent or *ratio decidendi* of an earlier case which covers the case being considered; (ii) the criterion of justice remains; (iii) no recognized rule of law or equity must be disregarded. Lord Sumner had proceeded by first rejecting as inapposite to the facts of the case the legal remedy of money had and received and the remedy in equity illustrated by *Hallett's Case.*[20] In truth he was extending by analogy the principle of the latter case. But the extension is a new departure, and the new *ratio decidendi* is a new precedent. It is to be noted that Lord Sumner does not hesitate to invoke as the decisive factor the principle of what is just in the actual circumstances of the particular case. That is, or ought to be, the true and ultimate criterion of every rule of law, though, if the rule is a new rule, it should be brought into harmony, as far as may be, with established rules. I am not sure that I clearly understand what is meant by the established rules of law and equity to which Lord Sumner refers. There is a sense in which judges have spoken of the law as something too clearly established to stand or fall by any particular precedent, or to need any particular support on grounds of reason, uniformity, justice, or convenience. It was, I take it, in this sense that it used to be said that the law was to be found in the breast of the judges, or that more elegant times have figured the law as an ideal system laid up in heaven, the judges being the law's inspired apostles. To my way of thinking, however, every rule of law should be able if challenged to justify itself on one of the grounds I have stated. I do not say that the generally accepted law would of necessity fail to pass the test, but I cannot help observing as a single instance that,

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[19] *Ibid.*, at p. 458.

[20] (1880) 13 Ch. D. 696.

in 1914, the rule in *Shelley's Case* was still law. In *Rann* v. *Hughes*,[21] Lord Chief Baron Skynner, in delivering to the lords the opinion of the judges, was content to say: " All contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain, as contracts in writing.' The chief baron decided this fundamental principle by a mere dogmatic assertion without condescending to justify it by an appeal to reason, justice, or convenience. Thus that rule was finally settled by the House of Lords. One object of the law revision committee has been to review some of these dogmas of the law and see how they come into existence and what function they fulfil. For instance, the much criticized and illogical rule in *Baker* v. *Bolton*[22] was founded on extempore observations of Lord Ellenborough which became established in text-books and followed by judges, though criticized by Lord Bramwell, and became finally sanctified by the House of Lords in *The Amerika*[23] on the ground of views of legal history which the highest authorities on legal history say were inaccurate.

The rule of the binding effect of precedents thus depends, as Lord Campbell insisted, on ascertaining the *ratio decidendi* of a case. If that is defined and the decision is that of the House of Lords, the *ratio decidendi* is to be treated as if part of an Act of Parliament and is as little affected by criticism or in need of justification. It becomes a datum. It may, however, be as difficult to define the particular *ratio decidendi* as to construe an Act of Parliament. There may, moreover, be cases in which no *ratio decidendi* can be found, because the reasons given by their Lordships are so diverse that no common principle accepted by the majority can be extracted. There is then only the judgment, and the most that can be said is that on certain facts a certain conclusion was reached but on what principle it was reached is left obscure. It is necessary to distinguish the judgment, the *ratio decidendi* (if ascertainable), the various matters of observation on points of law not necessary to the decision, and the general explanatory discussions. All these matters, in addition to a narrative of the facts, which is not necessarily limited to the strictly material facts, are generally found in the elaborate judgments of appellate Courts. The observations do not constitute precedents, but what is contained in the judgments, apart from the *ratio decidendi*, may be regarded as by way of explanation and illustration, somewhat analogous to the explanations and illustrations which in the American Restatements accompany the sections which state the rules of law. How far the observations of even the most eminent judges are from constituting precedents can be illustrated from many cases. Let me take the important authority of *Lloyd* v. *Grace Smith and Co.*,[24] where it was held that a principal was liable for a fraud committed by his agent within the scope of his authority, whether the fraud were committed for the benefit of the principal or for the benefit

[21] (1778), 7 T. R. 350, note (a).
[22] (1808) 1 Camp. 493.
[23] [1917] A. C. 38.
[24] [1912] A. C. 716.

of the agent. The majority of the Court of Appeal had held that the principal's liability depended on whether the fraud was committed, not merely within the scope of the employment, but also for the principal's benefit. They so decided on the basis of what had been said by Lord Bowen in the Court of Appeal in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*,[25] and by Lord Davey in *Ruben* v. *Great Fingall Consolidated Co.*[26] Lord Macnaghten in delivering the leading opinion in the House of Lords disposed of these observations, though expressing the most profound respect for Lord Bowen and Lord Davey, by saying: 'In neither case were the opinions so expressed necessary for the decision, and I dissent most respectfully from both.'[27] Lord Macnaghten was then able to explain that the view he rejected, which was the view certainly current in the profession, for some time, was based on misunderstanding of a judgment of Willes J. in the Exchequer Chamber and was contrary to a mass of authority. But though there was no contrary authority, a Court would not be bound by such observations uttered even in the course of an opinion in the House of Lords or Court of Appeal. Indeed Scrutton J., the trial judge, had exhibited what Pollock calls judicial valour and had properly refused to follow these observations; so also did Vaughan Williams L.J., in dissenting from the majority in the Court of Appeal, who accepted the observations. Quite recently in *Rex* v. *International Bondholders*,[28] the Court of Appeal had acted upon observations of Lord Selborne and Lord Romilly, but the House of Lords overruled their views. Courts *in banco* and divisional Courts have proved particularly fertile sources of misleading *dicta*. In the very recent case of *United Australia* v. *Barclays Bank, Ltd.*, in 1940,[29] the Court of Appeal followed a *dictum* of Bovill C.J., in an earlier case, but the House of Lords had no difficulty in holding that it was as destitute of reason or convenience, as it was of authority. I need not multiply instances. *Dicta* may be valuable and may require consideration. But however eminent the judge who utters them, they are not authorities or precedents and may in fact constitute a trap for the unwary. In recent times this is becoming more and more recognized. It may be that the true moral is that judgments should be shorter.

It is, however, not always easy to define the true *ratio decidendi*, and in some cases there may be no *ratio decidendi* in a judgment, for instance if each of the appellate judges gives a different reason. Differences of opinion do not matter so long as there is a majority for a particular reasoning. Thus in the important and much criticized case of *Amalgamated Society of Railway Servants* v. *Osborne*,[30] though all five of their Lordships agreed on the result, three based their decision on one ground, namely, that the collection and administration of the Union's funds for

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[25] (1887) 18 Q. B. D. 714, at p. 718.
[26] [1906] A. C. 439, at p. 465.
[27] [1912] A. C. 716, at p. 738.
[28] [1937] A. C. 500.
[29] [1940] 4 All E. R. 20, reversing [1939] 1 All E. R. 676.
[30] [1910] A. C. 87.

political purposes were *ultra vires*, the other two on the ground of public policy, because they thought that the independence of the Members of Parliament who were subvented out of the fund would be interfered with. The former ground alone was the *ratio decidendi*. We have seen in *Beamish* v. *Beamish* that if the lords are equally divided, there is still a *ratio decidendi* to be found in the decision of the inferior Court, which stands when there is an equal division in the Appellate Court, and binds the lords in a subsequent appeal however erroneous it may seem to them. I cannot help feeling that this is an unfortunate result, though I see how it follows on a formal and arbitrary logic, without any substantial value, from the doctrine that if the actual decision of the house embodies a *ratio decidendi*, it is equal in potency to an Act of the Legislature. But it has happened that the House of Lords in a subsequent appeal, has been unable to extract any *ratio decidendi* from a previous decision. Such a case was *Great Western Railway Co.* v. *Owners of S.S. Mostyn*,[31] where the issue depended on the construction of sect. 74 of the Harbours, Docks and Piers Clauses Act, 1847, which imposed a liability on the owners of a vessel for any damage done by such vessel to a harbour, docks, or works connected therewith. There was no express qualification in the clause, save when the vessel doing the damage was in charge of a compulsory pilot. It was contended that the owners were not liable as they were not actually or vicariously guilty of any negligence. The majority of the House held that they were liable because the words of the section were clear and unambiguous and it was not competent to import into the section a qualification that was not expressed. The motive of Parliament, it was said, could not be known or inquired into, and it was wrong to limit the clear effect of the words even if it meant attributing to the legislature an intention to impose liability in the absence of fault. But, before finally deciding the case, it was necessary for their Lordships to examine an earlier decision on the same section in *River Wear Commissioners* v. *Adamson*,[32] just half a century previously. From that decision the judge and the Court of Appeal in the *Mostyn Case* deduced the principle that where no negligence was proved, liability did not fall on the shipowner under the section. If that was the true *ratio decidendi* of the earlier case, the lords in the *Mostyn Case* would have been bound, contrary to what they held to be the true construction of the section, to hold the shipowners liable. But the facts were different. In the *Mostyn Case* the ship was under the control of the shipowners' servants though the casualty was the result of a mere accident. In the *Wear Case*, the ship was not under the shipowners' control, but was a derelict, a mere wreck at the mercy of winds and seas which drove her on the pier. In the *Mostyn Case* the lords made a careful examination of the decisions of the Court of Appeal and of the lords in the *Wear Case*, to ascertain the *ratio decidendi*. That was not easy to determine because

[31] [1928] A. C. 57.

[32] (1877) 2 App. Cas. 743.

of the great divergence of opinion as to the grounds, though the general conclusion was the same. But the only principle that the lords could deduce from the *Wear Case* was that the owners were not liable in the case of a derelict ship. So much weight had to be given to the earlier decision, but no general principle of non-liability in the absence of negligence could be collected from the opinions in the earlier case because these opinions did not exhibit either a unanimous or majority consensus. All that could be said of the earlier decision was that it would have bound the House if the facts had been identical. This is merely a single instance of the great difficulties which may be met and the great care which is necessary in considering precedents. It is easy to misread them as so many cases show.

I may perhaps refer to a curious case, *Bell* v. *Lever*,[33] which had a chequered career in the Courts. The Trial Judge, the Court of Appeal (Scrutton, Lawrence, and Greer L.JJ.), and two members of the House of Lords (Lord Hailsham L.C., and Lord Warrington), were all for deciding in favour of the plaintiffs; three members of the House of Lords (Lords Blanesburgh, Atkin, and Thankerton) were of the contrary opinion and decided for the defendant. I disregard a number of subsidiary issues which bulked very large in the opinions of the majority of the lords. The plaintiffs were claiming back a large sum of money which they had paid under a settlement agreement to their manager to terminate his employment. Their case was that they contracted to pay it and had paid it under a mutual mistake because both parties acted under the common belief that the agreements of employment could not be put an end to without the consent of the employee, whereas if the facts had been known he was liable to summary dismissal because of his fraudulent misconduct. If the matter is looked at in order to define the *ratio decidendi*, disregarding elaborate explanations and observations contained in the opinions, the real issue was whether the mistake as to the legal relation between the parties under the compensation agreement was made sufficiently vital or essential to bring the case within the rule laid down by Lord Westbury in *Cooper* v. *Phibbs*[34] which bound the lords. This seems to have been the explanation of the decision given by the Privy Council in *Norwich Union Fire Insurance Society, Ltd.* v. *Price, Ltd.*[35] On this footing the much controverted case of *Bell* v. *Lever* is no more than a particular illustration of a general rule. This is another illustration of how difficult it may be to construe precedents. The use of precedents and of authorities is a difficult and baffling art.

The doctrine of precedents applies, as has been seen in referring to the *Wear Case* and the *Mostyn Case*, to the construction of statutes as well as to the enunciation of rules of common law and equity. These two cases show a contrast between two methods of interpretation, the more literal and the more latitudinarian. The *Mostyn Case* illustrates the

[33] [1932] A. C. 161.
[34] (1867) L. R. 2 H. L. 149, at p. 170.
[35] [1934] A. C. 455, at p. 463.

former, the *Wear Case* the latter, method. During the half century which intervened between these two cases the former method has prevailed. Whenever the words are clear and unambiguous the literal meaning must prevail, so the general trend of modern precedents shows, even though some maxim, rule, or predilection of common law or equity is contravened, as in the *Mostyn Case* the House of Lords went counter to the then prevailing predisposition against liability without *culpa*. The former tendency was to read into statutes qualifications which were not expressed but which were considered necessary to harmonize the legislation with the general law. It was once long ago said that the law would not give effect to a statute which was against reason. But it is long since it was recognized that the legislature can override settled law. Much modern legislation deliberately does so. I only mention this obvious truism because I see some survival of the old prejudice in the latitudinarian method of interpretation. Foreign jurists like Gény favour that method, but that is clearly because the circumstances are different. A general code like the *Code Napoléon* must necessarily fall short of dealing with modern needs and conditions and hence the Court has to supply the want, to fill up the interstices by a liberal interpretation. Again the generality of the language requires definition. But that is not generally (though it is sometimes) true of modern English Acts which constantly create new rights and liabilities outside the ordinary law. The Court has, then, no right to insert conditions and qualifications not expressed by Parliament but such that if intended, could and would have been expressed. As Lord Shaw said in the *Mostyn Case*,[36] the words of the statute being plain and clear, to construe them in the broad sense would be an intrusion of the judiciary into the province of the legislature. All the same, however, there must occasionally be cases when something has to be supplied to a statute, just as sometimes a term has to be implied in a contract because it is necessary to give effect to the manifest intention of the parties. Acts cannot provide always for every possible contingency. The Court must then give effect to the intention and policy of the legislation. To take one instance, in *Hearts of Oak Assurance Co., Ltd.* v. *Attorney-General*,[37] the question was whether under the relevant Acts the inspector appointed to hold an enquiry should hold the enquiry in public or in private. There was no express provision on the point. The House of of Lords, reversing the Court of Appeal, held that the inspector was not entitled to hold the enquiry in public. That was filling a gap in the Acts. The House made an elaborate examination of the general provisions of the Acts and their policy and were satisfied that the construction at which they arrived tended to efficiency and was not unfair. On the other hand, a literal interpretation was preferred in *Rowell* v. *Pratt*,[38] where it was said that if the words of an enactment are fairly capable of two interpretations, one of which seems to be in harmony with what is just, reasonable, or

[36] [1928] A. C. 57, at p. 87.
[37] [1932] A. C. 392.
[38] [1938] A. C. 101.

convenient, while the other is not, the Court will prefer the former. But if the words properly construed admit of only one meaning, the Court is not entitled to deny that meaning merely because the Court feels the result not in accordance with the ordinary policy of the law or with what seems to be reasonable. I need scarcely observe that the construction of words in one Act is not a precedent for the construction of similar or the same words in another Act. Words in each Act take their colour from the policy of the Act and their setting because every part of the Act may throw light on every other part. Analogies from the comparison of one Act with a different Act may be quite misleading, just as in the case of contracts, wills, or other private documents. At the same time they may be helpful. Each must be construed so as to give effect to the actual intention.

A most important example of the evils which may follow from the precedent system applied in connexion with the latitudinarian method of construction is afforded by the history of the judicial interpretation of the Workmen's Compensation Acts. These Acts were, as is generally known, intended to give compensation to every workman when an injury happened to him by accident in the course of his employmeut subject to certain express limitations. But established rules of law such as common employment, or contributory negligence of the man, had no place; indeed his gross and wilful misconduct was no bar to the claim if the injury was serious. Very general words were used such as the word 'accident.' In Ontario a simple and effective administrative procedure has been established with the intention of getting rid of the nuisance of litigation. The English Acts have opened floodgates of litigation. There are some thousands of reported cases upon them, very many in the House of Lords. The Court of Appeal were at least in the early stages the worst offenders in introducing limitations, subtleties, and refinement not to be found in the Acts. Some of their worst aberrations were put right by the House of Lords, but the House itself introduced in certain cases vexatious precedents. One was the doctrine of the 'added peril' which meant that, notwithstanding the clear words and intention of the Act, if a man was grossly negligent or recklessly negligent in doing his work, he was adding a new risk of accident, and that the injury resulting therefrom did not arise out of the course of his employment. An amending Act was passed to reverse or qualify this doctrine, but even afterwards, though the House emphasized the difference between a man doing his work rashly and his doing something of a different type from what he was employed to do, the old idea crept in again and had twice or thrice more to be scotched by the House of Lords. It was only the other day that in *Noble* v. *Southern Railway Co.*,[39] the House had to listen to several days of argument and to the citation of sixty cases (so Lord Atkin counted) to decide a point already covered by decisions of the House.

[39] [1940] A, C, 583,

The House reversed the Court of Appeal which had followed an earlier decision of the Court. That raised the curious problem whether the Court of Appeal are obliged to follow an earlier decision of their own which was manifestly contrary to a later decision of the House of Lords. I think that common sense seems to indicate that the Court of Appeal should take the responsibility of acting upon the law laid down by the House of Lords, and not place upon the litigant, who is clearly entitled to succeed, the onus of bearing the expense and toil of an appeal to the House of Lords. The position is no doubt different when the earlier decision of the Court of Appeal is manifestly wrong, but the House of Lords has not ruled upon it. Such a case was *Lissenden* v. *C. A. V. Bosch, Ltd.*,[40] where the Court of Appeal naturally and truly described the earlier decision as shocking, but felt bound to follow it. The earlier decision had been given as long ago as 1913. The question depended on the rules of procedure applicable to the Workmen's Compensation Act. The Court of Appeal gratuitously, without any warrant from the statutory language, had inserted an unjust and illogical limitation on the workman's right of appeal. In several cases the Court of Appeal followed this decision, as they felt bound to do, on the generally accepted theory of precedent. It was not until 1939 that a workman had the courage or the money to bring the question before the House of Lords which was able to terminate the career, only too prolonged, of the unfortunate ruling of the Court of Appeal which had been a bad precedent for twenty-eight years.

Cases relating to questions of public policy raise some special problems in connexion with the strict rule of precedents. Judicial declarations of public policy depend partly on the conditions in fact existing at the particular time, partly on general opinions then current, at least as reflected in the principles or prejudices entertained by the judges. For instance, the recent decision of the House of Lords in *Fender* v. *St. John-Mildmay*[41] may be said to turn partly on the working of decrees *nisi* in divorce, partly on a general change of opinion as to marriage. It would be strange if a judicial decision could fix the law in matters of public policy when it was manifestly contrary to the facts and opinions of the later time. That this is so has been recognized in effect, though not always perhaps explicitly, by the Courts. Thus the meaning of the ancient doctrine of restraint of trade was applied with a difference to modern conditions of trade in the *Maxim Nordenfelt Case.*[42] Nordenfelt had, by covenants unrestricted as to space, bound himself for twenty-five years not to compete with the purchasing company. The Court of Appeal held that the covenant, being unlimited in space, was contrary to the recognized policy of English law and was unenforceable. The House of Lords reversed that decision because under modern conditions of trade and industry a world-wide restraint might be, and was in that case,

[40] [1940] A. C. 412.
[41] [1938] A. C. 1.
[42] [1894] A. C. 535.

reasonable and unobjectionable. Lord Watson's observations are so peculiarly valuable on the point, that I cannot forbear quoting them because as I think they incidentally suggest a policy of the law possibly of wider import and application.

> A series of decisions based upon grounds of policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule and would, if judicially enforced, prove injurious to the community.[43]

By a somewhat analogous line of thought, the House of Lords in *Bowman* v. *Secular Society, Ltd.*,[44] upheld the validity of a bequest to a society which was formed for objects which involved a denial of Christianity but without involving either scurrility or blasphemy. The validity of the bequest was attacked because it was said that the Christian religion was part of English law and that any denial of it was either a breach of law or against public policy. Lord Sumner said that the essence of the offence of blasphemy was not irreligious words but their manner, 'their tendency to endanger the peace then and there, to deprave public morality generally, to shake the fabric of society, and to be a cause of civil strife. The words, as well as the acts, which tend to endanger society, differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. . . . After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact.'[45] It has been said that no precedent can become obsolete. Do not the passages which I have just quoted express a truer idea? There are, however, some questions of public policy which do not, I imagine, change with the times, for instance the rule that a man or his estate must not be allowed to profit by the fruits of his crime. For instance, public policy does not, in jurisdictions in which intentional suicide (by a sane man) is a crime, permit recovery by his representatives of the insurance moneys on his life, *Beresford* v. *Royal Insurance Co., Ltd.*[46] A remarkable contest between the more elastic and the more rigid view emerged in *Rodriguez* v. *Speyer*[47] on the question whether in an action brought after the outbreak of war for the purpose of winding-up a partnership

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[43] At p. 553.
[44] [1917] A. C. 406.
[45] At p. 446.
[46] [1938] A. C. 586.
[47] [1919] A. C. 59.

and getting in the debts, the former partner who had become an alien enemy could be joined as a co-plaintiff with the English partner. Lord Sumner was of opinion that to allow this was to infringe a rule of law against trading with the enemy; that it was not a case of applying public policy. Lord Haldane, on the other hand, was of opinion that there was no crystallized rule of law involved, that the question was to be decided by considerations of convenience and the balance of public interest and that the action might proceed. That was the view of the majority of their Lordships. Lord Haldane observed that what the law recognized as against public policy varied from time to time, even though in certain cases the rule originally based on public policy might become a fixed rule of law, like the rule against perpetuities, unalterable save by Act of Parliament and incapable of being moulded to fit the exigencies of the times.[48]

I may note another class of cases, those which deal with the construction and application of a written constitution to powers and limitations under it. Great Britain has no written constitution. No such question can come before the ordinary Courts in Britain or before the House of Lords except in an appeal to the House from the Courts of Northern Ireland as in *Gallagher* v. *Lynn*.[49] I can deal therefore very shortly with the question whether or to what extent a decision on the interpretation of a constitution is final and binding on a Court of ultimate resort. As I understand it, the Supreme Court of the United States does not hold itself bound by earlier decisions of the Court of that class, or perhaps of any class. Marshall's words 'it is a constitution we are interpreting' are often quoted as a warning that a narrow and rigid construction cannot be applied to the infinite variety of conditions which arise in the long evolution of a great nation in the course of the centuries, least of all in those parts of it which are characterized by a 'convenient vagueness.' I may refer to the book of Professor Felix Frankfurter, now Mr. Justice Frankfurter of the Supreme Court, on *Mr. Justice Holmes and the Supreme Court* for some account of the fluctuating course of judgments on the 'due process' clause. It seems clear that, generally speaking, a rigid method of precedents is inappropriate to the construction of a constitution, which has to be applied to changing conditions of national life and public policy. An application of words which might be reasonable and just at one time, might be wrong and mischievous at another time, though in a sense the question might be the same. The language has not changed and in a sense its meaning has not changed, but it must be moulded to suit the need of the times in some aspects not unlike a public policy. The rule here accordingly should resemble that in regard to public policy.

I do not develop this important topic, save to observe that the Privy Council is not bound in any event to follow its own decisions. Its judgments are not like judgments of an ordinary Court of law. They are

[48] At p. 81.

[49] [1937] A. C. 863.

opinions given to the King in Council, which, if accepted as they always are, are embodied in Orders in Council. For this reason there is no possibility of registering dissent, if there is dissent, among the members of the board. The opinion does not necessarily represent the opinion of every member; it may be only that of the majority.

How far the Privy Council is bound by the decisions of the House of Lords is not very clear. The point may perhaps be academic, because the board of the Privy Council is drawn practically from the same judges who take part in the judicial sittings of the House of Lords. Lord Dunedin, in *Robins* v. *National Trust Co.*,[50] while accepting that the decision of the English Court of Appeal in a question of law would not bind a colonial appellate Court even in a colony which is regulated by English law, seems to be of opinion, though he does not so decide, that a decision of the House of Lords would be binding on the colonial Court. No doubt a decision of the Privy Council would be binding in the Courts of the colony concerned, but it is not a necessary consequence that the same is true of a decision of the House of Lords. It is true that, in *Grant* v. *Australian Knitting Mills, Ltd.*,[51] the Privy Council said, as the High Court of Australia had said, that they would follow the decision of the House of Lords in *Donoghue* v. *Stevenson*.[52] But that does not necessarily involve the view that either Court was bound or that that decision was part of the law of Australia until adopted by the High Court or the Privy Council. Even in colonies or Dominions which have English law as their basic law the position is complicated by the rule that what is there meant by English law is English law so far as applicable to the colony and as it existed at a particular date, generally the date of the settlement. The colony is competent to change its internal law by legislative act, even though in doing so it changes fundamental rules of the common law. I need not give instances of what is everyday practice. Under the Statute of Westminster 1931, a Dominion, subject to specific limitations, can legislate extra-territorially and can change or repeal even an imperial statute, which applies to the Dominion. The House of Lords has not jurisdiction to define or declare colonial law, as it does in the case of Scots law, which, as for instance it is in regard to the doctrine of consideration, may be different from English law. The House of Lords is the ultimate Court of Appeal for Scots, as well as for English law. But to define and declare colonial law is the province of the Privy Council which is the ultimate Court of Appeal for that purpose. I feel great difficulty in accepting the view that the Privy Council is bound by a decision of the House of Lords on English law. That does not involve that there is not a substantial uniformity between the common law in England and in the colonies in which it is the basic law, just as there is between the United States and England. Nor does it mean that either the Privy Council or the colonial Court do not pay great respect to decisions of the House of Lords. All

[50] [1927] A. C. 515, at p. 519.
[51] [1936] A. C. 85.
[52] [1932] A. C. 562.

that is being here considered is whether the decisions of the House of Lords are binding precedents, in the strict sense, on the Privy Council and the colonial Courts. In practice, the distinction is not perhaps very material. Indeed I question, as I shall explain, whether much practical difference would ensue if the House of Lords were no longer bound by its own decisions. The Privy Council is clearly not bound by its own decisions. The constitutional reason which Lord Campbell gave in the case of the House of Lords does not apply to an executive body like the Privy Council or to the judicial opinions of its judicial committee. But it is only in very rare cases that it refuses to follow one if its earlier decisions as it did in *Mercantile Bank of India, Ltd.* v. *Central Bank of India, Ltd.*[53]

There is another question which has been a good deal discussed, namely, whether the House of Lords should reverse a decision of the Court of Appeal which has stood for some time. If it were established that it could not, the result would be to turn the Court of Appeal in such cases into a final Court by some sort of prescription, by an indeterminate period of limitation circumscribing the duty or right of the House to correct an error in the law made by the Court of Appeal. That the House of Lords has not so tied its hands is I think clear. How could it do so consistently with its functions as a revising authority to correct errors in the law and to set the feet of the law on the right road ? The House of Lords cannot adopt as its motto *communis error facit jus.* It cannot merely say that its duty is to administer the law: its duty is in general, where that is called for, to correct the law, except in so far as the law is defined by its own decisions save in exceptional cases. There may be cases where the House has acted upon a rule that antiquity should prevail over law, but these are exceptions and the modern tendency is against upholding a wrong and unjust decision merely because a long time has elapsed without an appeal being brought, or without the House having an opportunity of passing it under review. I have already referred to *Bowman* v. *Secular Society*, where the House overruled two decisions which had stood for round about half a century and did so on grounds of law, not merely of public policy. In *Bourne* v. *Keane*,[54] which dealt with the disposition of property, the House overruled a case which had been regarded as a leading authority for over eighty-four years, and had been constantly followed. Lord Wrenbury dissented, and collected a number of statements of practice which tended to show that the House might be deterred, or has been deterred, from interferring under certain conditions with the earlier cases. Lord Birkenhead L.C., who gave the leading opinion, stated that he could see no reason why what he regarded as a misstatement of the law should be perpetuated. He cited a number of cases and said in effect that he could not find that they compelled acceptance as accurate of a doctrine plainly outside a statute and outside common law, when no title and no contract would be shaken, no person could

[53] [1938] A.C. 287.

[54] [1919] A.C. 815.

complain, and no general course of dealing would be altered by the remedy of the mistake. He has, I think it is clear from his speech, in mind decisions affecting the general conduct of affairs, particularly as affecting the public, and questions of title to land, and to law 'which men follow in their daily dealings,' to use the words of Sir George Jessel M.R. There are certainly a good many *dicta* on this matter not easy to reconcile, but I cannot see how the question can be regarded as other than a matter of the discretion of the House to decide in the particular case. *Primâ facie* for the House to perpetuate a construction of a statute which it thinks is clearly erroneous is to change the mind and intention of the legislature, and to substitute a different enactment from that which Parliament passed. It would require great antiquity and convincing reasons of convenience to justify such a course. The House did not hesitate to reverse the earlier construction of the statute in *Bourne* v. *Keane*, or *Bowman* v. *Secular Society*, or in *Lissenden's Case*, the case under the Workmen's Compensation Act cited above, which upset a decision of twenty-eight years' standing on a matter of frequent occurrence between employers and workmen. In a series of appeals by rating authorities against certain occupiers of premises, the House, in *Westminster Corporation* v. *W. H. Smith & Son, Ltd.*,[55] reversed a decision of the Court of Appeal with reference to the rateability of shops and other tenements in railway stations. The Court of Appeal had followed an earlier decision of that Court in 1882, *Smith* v. *Lambeth Assessment Committee*.[56] It appeared that W. H. Smith & Son had, at the date of the action out of which the appeal had come to the House, entered into their then current agreement under which they held the premises for twenty-one years from 1929, on the basis of the earlier case under which it was held that their occupation under a practically identical agreement was not rateable. It is clear that if Smiths did not pay rates it would be unfair to the other ratepayers in the area. The House said that there was no rule which debarred their Lordships from doing justice even at the cost of reversing an old authority, that is an authority of a Court inferior to the House. Opinions in earlier cases of Lord Loreburn and Lord Atkinson were quoted to the same effect. It was not sufficient to perpetuate an anomaly merely because parties had entered into engagements on the footing that the anomaly would continue. On the other hand, there may be established rules of law not affirmed by the House but treated for many decades as axiomatic in the ordinary dealings of men and upheld by the Courts other than the House of Lords, which even if not thought the best rule would not be upset by the House. Many matters have to be considered. An interesting case was *The Valverda*.[57] The House refused to review the consistent and unbroken course of authorities in the Admiralty Court and the Court of Appeal, which had held that the Admiralty was excluded from all claims for salvage, except in so far as the practice had been saved by the

[55] [1936] A. C. 511.
[56] (1882) 10 Q. B. D. 327.
[57] [1938] A. C. 173.

amending Act of 1916. But that Act itself was based upon and recognized the general exclusion. This amending Act was thus in itself a strong reason against reviewing the earlier decisions which, in addition, were not clearly erroneous as a matter of construction though their result was not satisfactory or equitable. The Admiralty, it was clear, could at any time have brought in an amending Act, but they did not do so until 1940 after the decision of the House in *The Valverda*. The anomaly was thus corrected at last. The general effect of *The Valverda* is, I think, that the House has a general power to upset long-established decisions but may even in a plain case of error refuse to do so for special reasons. To do so is to exercise a discretion to depart from its normal duty and function which is to amend erroneous rulings of law. If the House exercises its discretion, it does so by way of exception, and must itself be the judge whether the circumstances of the particular case justify the exception, though no doubt with due regard to what has been said on the point by the House on previous occasions where the question has arisen.

Holmes once said that the life of the law was not logic but experience. Like most epigrams, this was not and was not intended to be more than a half truth. Indeed logic at most is only a method or pattern of thought working on the material presented to it to work on. This is peculiarly true of law, at least of case law; there is no doubt a greater degree of logic in reasoned expositions by theoretical writers of legal principles. In such expositions a branch of law, such as contract, tort, or quasi-contract is defined as to its general scope and purpose, the main subject is analysed into its divisions, and these again into their subheads and ramifications. Much comparison is necessary of particular subsidiary rules or instances, accompanied by distinctions and reconciliations. There is here scope for systematic logic and for inductive reasoning. But in actual case-law the logic is more limited. Let me take as an illustration of this the modern process in dealing with a case. There will be facts to be ascertained and determined, probably on conflicting evidence. The evidence may be largely circumstantial, which will involve inferences, more or less instinctive. But when the material facts are determined, it will be necessary to find the rule of law by which to decide the issue. In modern days, the judge does not, as it were, start from scratch. He is somewhat like (though the parallel is not exact) a physician diagnosing a case. The physician examines the patient, and does so with his trained sense, with his mental background of physiological, anatomical, pathological knowledge which he has learned, and with his experience of other like cases. Thus he directs his attention to the material symptoms and so diagnoses the complaint and prescribes the remedy. Somewhat in the same way the judge does not approach the case with a blank mind. Subconsciously or consciously, trained mental processes are involved, rules learned in the past function in his mind, his own past experience and his past reading of other cases all combine to lead to a judgment. Thus sometimes a judge seems to move almost instinctively to the heart of the problem and its

solution, though the detailed explanation and justification of what the problem is and how the solution is justified may require some elaborate reasoning and citation of authorities. Another judge may approach the matter by collecting or recollecting material cases, and find in one or more of them the rule he desires. The logical process here is the comparison of the cases which results in a perception of similarity or difference. The judge may find a case so like, that its *ratio decidendi* covers the case before him, but it will more generally happen that he will be able to select a case or cases more or less near, which take him so far towards his decision and then leave him to finish the task of judgment by his own resources. For instance in *Bell* v. *Lever*, the judge could go step by step with previous authorities to the point that a mutual mistake as to the existence of the prior contract would render an agreement based on that mistake unenforceable; then he would have to decide whether the same result followed when the prior contract was indeed existing, but could be cancelled without compensation, and was voidable. Here the ways parted, and the judge had to make up his mind by analogical reasoning, and by his perception of what was just or convenient; or the test may more objectively be expressed to be whether the mistake was sufficiently fundamental to outweigh the actual existence of the contract. The process is not essentially different if there is no guiding authority for part of the way, but the judge has to proceed on his own responsibility from the start. The conditions postulated by Lord Sumner in *Sinclair* v. *Brougham*, perhaps furnish a middle case. In any event there are in the judge's mind the general principles of law which apart from any specific authority he may not infringe, and there is the background of professional tradition, education, and experience, somewhat like that which the physician possesses. The physician is inspired by his desire to restore health in his patient, the judge by his desire to do justice in the particular matter. Each has to work by rules. The function is rather that of the νοῦς πρακτικος than the νοῦς θεωρήτικος. There is an object to be achieved and an act of will in achieving it.

It is, I imagine, substantially true to say that in every case at one stage or another the element of precedent takes part, sometimes more coercively and sometimes less so, according as in greater or less degree the case requires a new departure from existing precedents. Hence it appears how essential is the part played by precedents in the English judge-made law. As has been seen, a large part of modern law is statute law. There the general rule is given to the judge. He has to understand and construe it and to apply it correctly to the facts. Precedents then play a smaller rôle unless there are already decisions on the particular provision or to the extent that established principles of construction govern or assist the judge. There is no doubt a tendency for the English lawyer to think of law as being merely judge-made law—in which it is for the judge not only to apply the proper precedents but to decide on what is the policy which the judge is to give effect to. In statute law the policy is to be

found in the statute itself. In a vast range of modern statutes, or statutory rules and orders, disputed cases do not ordinarily come before the Courts at all. They are dealt with by administrative tribunals, though they involve the rights of individuals. The House of Lords recognized, in the great case of *Local Government Board* v. *Arlidge*,[58] that the procedure of the law Courts is not the only method by which facts can be determined and that judges are not the only persons able to decide facts. These statutes form a large part of the law all the same. Law and litigation are not synonymous. For obvious and familiar reasons administrative tribunals have in many modern statutes ousted the law Courts except for the very limited and occasional interpositions of the Court, on special reference permitted by the statutes or in cases where elementary rules of justice have been infringed. Many people think it would have been better if the Workmen's Compensation Acts had been dealt with by administrative tribunals. Perhaps in time they will be.

But judge-made law still covers a wide and most essential field. It still deals with such constantly recurring matters in the ordinary affairs of individuals, companies, and public bodies as matters of contract, tort, quasi-contract, agency, property law, wills, domicil, and many others. Even in these there is a plentiful leavening of statute law, but judge-made law is predominant. In some cases such as marriage law and divorce, the jurisdiction, though it is statutory, is entrusted to the Courts to administer and becomes the sphere of judge-made law and its attendant precedents.

English lawyers who have spent their professional life in working in the area of judge-made law are naturally proud of it. They can point by way of justification of their pride to the fact that the common-law system has spread over practically the whole of the English-speaking peoples of the world as their basic law. That in itself is a staggering proof of its merits and of its practical fitness to subserve the true purposes of law, though it is not claimed that it is perfect. Law is not an end in itself. It is a part in the system of government of the nation in which it functions, and it has to justify itself by its ability to subserve the ends of government, that is, to help to promote the ordered existence of the nation, and the good life of the people. Law is not autocratic. It must submit to criticism of its principles and its methods. English law has not failed to make the most drastic reforms of itself, with or without the help of Parliament. The Acts reforming procedure in the Courts of common law and Chancery in the fifties of the last century and the Judicature Acts of the seventies swept away the worst abuses of procedure and thus enabled, or at least helped, reforms of the substance of the law. Those features of the land laws which Maitland in the essay which I have cited above lashed with such scathing contempt have been largely swept away by the Acts of 1925 which have effected other drastic reforms. It is true that the legal reforms which have had the deepest effect on the

[58] [1915] A. C. 120.

life of the nation have been those which deal with social amelioration, such as factory Acts, Acts dealing with workmen's compensation, unemployment benefit and so forth. Such Acts belong to the conception that it is the business of the state to care for the welfare of all the people, as being the greatest national asset; a conception of utility far beyond the ideas of the utilitarians or the Manchester school. These law reforms, this social security legislation lay quite outside the scope or powers of judge-made law. But I believe that they have had and are having a reflex operation on judge-made law. They have created or helped to create a repulsion from arbitrary forms and a desire to look at the substance, an impulse to ensure that the law, in discharging its functions in its own sphere should also seek to promote in its own way and subject to its own limitations the well-being of the people. So far as I have read English legal history, the good English judges (many of them were good though some of them were very bad) have in all periods felt an urge to do justice between those who appeared before them, but their conceptions of what was just were sometimes very crude and were mostly those of the stout-hearted sensible Englishman of their age and class, tempered by some classical culture and the traditional ideas of the common law. More liberal views are now part of the ideas generally current and have their effect, an effect perhaps subtle and often not conscious, on the administration of that part of the law which it falls to the judge to administer. I am, however, here dealing only with the actual present-day law of precedents and I do not pretend to discuss what the future might bring in these days of town and country planning, of controlled economy, and so forth, if planning and controlled economy were applied to our legal system.

On the level of present-day practice and legal ideas, I may conclude with some general observations on the system of precedents. It belongs, as we have seen, to the method of case-law, according to which the Court does not lay down wider generalizations than the particular case requires. There can be no law without some general rules. In the common-law system these general rules are to be found in the generalizations, or *rationes decidendi*, enunciated in the particular cases, supplemented by statutes and some traditional principles of the common law, which form an ever-present background save as varied by case-law or statute. It is in these materials that there is to be found the element of certainty necessary to enable people to regulate their conduct and to enable judges to adjudicate. Critics say with some plausibility that the certainty is difficult to ascertain and is delusive. They point to the fact that a litigant no doubt acting on the best legal advice, may succeed in two Courts and be beaten by a bare majority in the final Court of Appeal, as in *Bell* v. *Lever*. If it were a question of counting heads, the final result there was three judges against six. Critics also point to the absence in judge-made law of general principles, the enunciation of which lies beyond the limited generalizations necessary for the decision of the

particular case. Thus, they say, no judgment contains, indeed it would be beyond the traditional scope of judgments that it should contain, general statements of principles; thus, no judgment has explained general legal concepts, such as the nature of quasi-contract or restitution and its relation to contract or tort (matters discussed by Professor Winfield in his writings), the true basis of the rules as to mistake and frustration in the law of contracts, and so forth. It is said by the critics that a man in planning his conduct either in action or in litigation, has to be guided by the effect of a mass of precedents. He may, if lucky, find one which precisely fits his case. But if he is not so fortunate he may have to wait until the very end of the chapter to know if he is right or not. It is then too late to retrace his steps and all he can do is to bear his fate and foot the bill and join with Bentham in regretting the incognoscibility of the law. Then, if critics take a wider view they point to the enormous waste of time and money involved in developing a larger rule of law, as illustrated for instance by the sequence of cases in the House of Lords, the *Mogul Case*,[59] *Allen* v. *Flood*,[60] *Quinn* v. *Leathem*,[61] *Sorrell* v. *Smith*,[62] *Thorne* v. *Motor Union*.[63] The report of *Allen* v. *Flood* in the House of Lords alone occupied 181 pages, to say nothing of all the reports in the other Courts of that case, and similarly of all the others and other cases on the same questions. But after all, the critics say, of these decisions spread out over so many years, is the final result so clear ? Is the rule so precise or does it leave various loose ends, some of which were indicated by Lord Sumner in *Sorrell* v. *Smith*, which may perplex the practical man in his future conduct ?

The critics will go on much longer with their objections, but I shall not here follow them farther. There is much truth in what they say, though they exaggerate the difficulties and defects of our legal system. Our law, like our constitution, has grown. It has not been constructed on one plan by a single great designing mind. I have already pointed to the conclusive proof of its substantial merit and of its general suitability to our national character.

But the critics will say that better is the enemy of good and that English law might be improved by the simple method of codification. The method of single precedents supplemented by a certain amount of judicial synthesis and explanation, and clarified by the more thorough-going analysis and synthesis brought to bear upon it by academic legal scholars and thinkers (as, for instance, Sir Frederick Pollock), belongs, it is said, to the evolutionary stage of the system. It is said that the time is now due and overdue for England to do that which Maitland referred to in the address delivered in 1906, which I have already quoted. The German, he said, ' has codified the greater part and the most important part of his law; he has set his legal house in order; he has swept away

[59] [1892] A. C. 25.
[60] [1898] A. C. 1.
[61] [1901] A. C. 495.
[62] [1925] A. C. 700.
[63] [1937] A. C. 797.

the rubbish into the dust-bin; he has striven to make his legal system rational, coherent, modern, worthy of his country and our century.' These are eloquent words, expressing a high ideal. What has happened in these days to the German Civil Code I do not know nor does it matter for my present purpose. Later on in the address Maitland says: 'One of the primary functions of a legislature is, I conceive, to sweep into the dust-bin the rubbish that inevitably accumulates in the course of legal history. We cannot, I fear, affirm that Parliament adequately performs this scavenger's task; and, from the very nature of the case, it cannot be performed by the judges. Much they can do in the way of accommodating old law to new wants; but they never can say that the old rule is rubbish and must go to the dust-bin.' Maitland states an ideal of passing all the stuff of a law through modern minds, debating, criticizing it and endeavouring to present it as a single coherent homogeneous whole. He asks 'Could anything of the same sort be said of us? Are we facing modern times with modern ideas, modern machinery, modern weapons? I wish that I could think so.' I should venture to re-echo that wish. The United States in their own way, by the series of Restatements of different branches of the law drawn up by the American Institute of Law have done something of the sort. Whatever detailed criticisms may be made, these Restatements are marvellous pieces of work, seeking perhaps rather to state the law as it is than to go to the full extent of Maitland's ideal. But their Illustrations and Explanations go a long way. They do not, however, form strictly a code because they have not legislative force; their operation is rather persuasive, than coercive. But they may be just as effective, if, as I am told, judges in practice with general assent follow them as true statements of law. We are too much wedded to coercive law, precedent, or statute, to be content with rules of law which derive their power from their excellence. In the future we may change this, or we may apply to the whole body of our law the process which Maitland pictures. The material to work upon is provided by our case-law and by such partial codes as we now possess. Thus commercial law, elaborated by trial and error under the leadership of Mansfield and his successors, has been codified in its more important branches. Why should not the same be done with contract, tort, quasi-contract, agency, and so forth? In the rules of Court scheduled to the Procedure Act of 1852, and to the Judicature Acts of 1873, we have a further instance of codification supplemented in the Judicature Act by the establishment of a statutory standing committee (the rules committee) to revise the rules from time to time, with a provision that, subject always to Parliament, these revisions are to have legal effect. But let it be noted that Maitland's process of codification would not be merely restating the law as it is accepted, but revising, recasting it, passing it through modern minds, adapting it to modern needs and ideas, and providing machinery for periodical revision. But I must stop; such ideals are alien to modern current law. We are in the midst of a war, and after the war urgent

problems enough will call for immediate solution. But the future is long. The man who plants an acorn knows he will never see the full-grown oak. But he plants it all the same.

But I must still deal with one problem—whether there is any real justification for the strict theory of precedents, whether it would matter in any useful sense if the Court of Appeal or the House of Lords could review their own judgments. At present a decision of the Court of Appeal is generally treated as binding upon it until it is reversed by the House of Lords, a decision of the House of Lords is in law binding upon it until it has been abrogated by the legislature. Why should not these Courts, each in its own sphere, have the same power of reviewing their own decisions as the Supreme Court of the United States, that august tribunal, or our own Judicial Committee of the Privy Council? Of course, the Court of Appeal would be bound by a decision of the House of Lords; that follows from the constitution of the Courts.

There need be no fear that the whole system of precedents would be destroyed if this change were so made. The instinct of inertia is as potent in judges as in other people. Judges would not be less anxious to find and follow precedents than ordinary folk are. Precedents are what they are because men faced with a problem ask 'Have we not had this before or something like it?' In addition, the respect for precedents is not only natural and intelligible, but is deep-rooted in the English legal tradition once the facts are established and the true precedent chosen. The precedent gives the Court a solution, ready made, so far as it goes. It carries the Court so far on its ascent to the goal, up to the stage from which the Court must make its own way. No Court will be anxious to repudiate a precedent. It will do so only if it is completely satisfied that the precedent is erroneous. If the Court is so satisfied, it is a humiliation which ought not to be put upon it to reproduce and perpetuate the error. I have taken part in various decisions where my colleagues and myself were satisfied that the precedent was erroneous and at times have said so. It is not edifying thus to exercise one's judicial functions, but such is the law. Such cases are very few indeed. But even the final Court of Appeal is not infallible and I cannot see that its value would be depreciated if in proper cases it were enabled to say that it had made an error and were empowered to correct it in the next case. Precedents would still be precedents, though not coercive but merely persuasive. If that were so, it may further be noted that there could not be the same urgency to carry to extremes the process of distinguishing from the then present case erroneous precedents. I have heard conveyancers boast that their ingenuity was equal to evading any conveyancing rule and I have heard distinguished judges boasting of the potency of the weapon of drawing distinctions. But it would be more dignified in the judge if he were able to say, with all respect and after anxious deliberation, that it was not safe to follow the earlier case. As to Lord Campbell's constitutional argument, I shall only say that I feel that it is at best

artificial and at worst doubtful. As to Lord Halsbury's quite different justification, I feel that there is greater public inconvenience in perpetuating an erroneous judicial opinion, than the inconvenience to the Court of having a question, disposed of in an earlier case, re-opened. As to the argument that the certainty of the law will be destroyed, I can only repeat that the quantum of certainty is in any event only relative, and that not much practical difference in that respect would follow from relaxing the stringent view as to the absolutely binding effect of precedent. What I have said earlier in this article relieves me from developing these aspects. I should prefer, if it were competent, Lord St. Leonards' opinion that every Court should have an inherent power to correct its own errors.

But there again my mentor reminds me that war time is not the time for changes not demanded by the war. One effect of war and the damage and destruction by enemy action of law libraries has been to reduce the number of authorities quoted in arguments in Court. Professor Goodhart has assured me that this will conduce to the improvement of the law. Our mistress, the common law, may after all draw some advantage from the war.

OXO

THE INTERPRETATION OF THE BRITISH NORTH AMERICA ACT

W. P. M. Kennedy

IN accepting the honour of writing an article for The Cambridge Law Journal, and in deciding to review some aspects of Canadian constitutional law, I realize that I must assume a good deal of knowledge on the part of my readers, otherwise it would be difficult to know where to begin, where to end, what to say, what to omit. For my immediate purposes it will be sufficient to point out that Canada is a federation of nine provinces created under the British North America Act, 1867,[1] carrying on its executive, legislative, administrative and judicial activities in public and private law under that Act and its amendments and under the great landmarks of English constitutional law in so far as not modified or changed by validly enacted federal or provincial legislation. Legislative powers are divided between the federal and provincial legislatures in such a way as to exhaust the whole field, which is not fenced, as in the constitutional law of the United States, with any constitutional limitations. Granted the legislative power, the manner of its exercise cannot be questioned in the Courts by any arguments drawn from a Bill of Rights, or by the many refinements, moral, political or legal, which flow from ' the privileges and immunities ' or ' due process ' clauses of the American constitution. In Canada the doctrine of legislative supremacy prevails.[2] Canadian legislative powers are distributed under the creating Act of 1867. To the provincial legislatures belong certain exclusive enumerated powers under section 92, while, under section 91, the undefined residue belongs to the parliament of the Dominion. For the moment detail is unnecessary. I purpose to view (*a*) the immediate historical evolution of these legislative powers in order to appreciate (*b*) the judicial process in relation to them. I shall not concern myself with the *minutiæ* of this process, fascinating as they are, but confine myself to certain aspects of it which have become fundamental.[3] I shall conclude (*c*) with a short view of the treaty-making power, as already it is under further discussion in Canada in the hope of peace ahead. I have specially selected these points of view for a law journal, because federalism and federal law and

[1] 30 & 31 Vict. c. 3. This Act and its amendments can be conveniently consulted in Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution* (Oxford, 1930), at pp. 617 *ff.*

[2] This doctrine is adequately illustrated by the words of Riddell J. in *Florence Mining Co.* v. *Cobalt Lake Mining Co.* (1908) 18 C. L. R. 275, at p. 279: ' In short the legislature within its jurisdiction can do everything that is not naturally impossible and is restrained by no rule human or divine . . . The prohibition " Thou shalt not steal," has no legal force upon the sovereign body.'

[3] Mr. Raphael Tuck, of Trinity Hall, Cambridge, and the Law School of Harvard University, provides a learned study of these *minutiæ* in ' Canada and the Judicial Committee of the Privy Council ' in 4 *Toronto Law Journal* (1941), at pp. 33 *ff.*

the judicial process in relation to them are matters of perennial interest and are already in prominence in connexion with the proposed reconstructions of the world. In addition, the judicial process in relation to the British North America Act, 1867, provides an important chapter in the study of statutory interpretation—a subject of equal perennial interest. I refrain from adding anything of a comparative nature, for I have neither the space nor the qualifications to go beyond legal analysis and reach the economic and social life of other federations, without an expert knowledge of which comparative law is of little worth.

(*a*) Origin and Statement of Legislative Powers

The immediate preliminaries to the British North America Act, 1867, are to be found in the conferences of representatives from the British North American colonies held in Quebec in 1864 and in London in 1866.[4] The Quebec Conference drafted a series of resolutions which met with such a political colonial reception as to nullify them as a basis for federation. It must be remembered, however, that, whatever their fate, the general purpose behind them, in relation to the distribution of legislative powers, remained unchanged amid all the colonial political difficulties. The years above noted will give some clue to the situation, coloured as it was both in sentiment and in express words by the American civil war. The colonists deliberately aimed to reverse the American system: to the provinces were to be allotted exclusive legislative powers over *enumerated* classes of matters and to the federation should belong the vast *residue* of undefined legislative powers. For better or for worse, this seemed an obvious lesson from that war to the colonial statesmen, especially to Sir John A. Macdonald who was the colonial counterpart to Alexander Hamilton. The failure of the Quebec Conference was, fortunately, not irretrievable. A further conference was held in London in 1866, acting with colonial approval. There the whole scheme was considered *de novo*, and sixty-nine resolutions were agreed on as a unanimous basis for the statutory structure of the new federation: 'the sanction of the Imperial Parliament shall be sought for the union of the Provinces on the principles adopted by this Conference.' If we keep in mind 'the general purpose' already referred to and flowing from American experience, we shall see that there never was any deviation from it. This 'general purpose,' this governing principle, is abundantly clear. The London Conference laid it down unequivocally:—

> In the federation of the British North American Provinces, the system of government best adapted . . . to protect the diversified interests of the several Provinces and secure efficiency, harmony and permanency in the working of the Union is a general government charged with matters of common interest to the whole country and

[4] The Resolutions of both these Conferences can be found in Kennedy, *op. cit.*, at pp. 541 *ff.*, 611 *ff.*

> local governments [for the Provinces] charged with the control of local matters in their respective sections.

The London Resolutions were forwarded to the Colonial Secretary with a request for legislation by the Parliament of the United Kingdom based on their express terms.

The London Resolutions contained an enumeration of provincial legislative subject-matters (Resolution 41)—a necessary process based on 'the general purpose,' 'the governing principle.' These the draftsman, Lord Thring, one of the greatest in history, turned into section 92 of the British North America Act. They became exclusive to the provinces for the simple reason that the London Conference desired the provinces to have 'control of local matters.' Again the London Resolutions (Resolution 28) assigned to the federal legislature 'power to make laws for the peace, welfare and good government of the federation . . . and especially laws respecting the following subjects.' Here followed thirty-six enumerated subject-matters of which the last read: 'And generally respecting all matters of a general character, not specially and exclusively reserved for the local legislatures.' Now, it is a matter of historical record that section 92 of the Act was drafted first; and, as Lord Thring approached the drafting of section 91 (the federal legislative powers), all that he strictly needed to do was to state that the federal legislature had power to legislate on all subject-matters not assigned exclusively by enumeration to the province. This, in fact, he did; and the clause would have been sufficient to distribute the powers. However, Resolution 28 confronted him, demanding its expression in statutory form. He did not, and could not, include its enumerated heads in section 91 as *further* powers, because Resolution 28 had referred to them as 'especially' subject-matters illustrative of the general residuary power given to the federal legislature. In sections 92 and 91, which were amply and carefully founded on Resolutions 41 and 28 of the London Conference, provincial powers were enumerated and exclusive, while federal powers were the residuum, with illustrations. The whole range of legislative powers within the new Dominion was exhausted by the distribution.[5]

Sections 91 and 92 of the British North America Act run as follows:—

VI. Distribution of Legislative Powers

Powers of the Parliament

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good

[5] '[Their Lordships] . . . adhere to the view which has always been taken by this Committee that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the [Canadian] parliament': Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1887) 12 App. Cas. 575, at p. 588. 'Now, there can be no doubt that under this organic instrument [B. N. A. Act, 1867] the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada': Lord Loreburn L.C. in *A.-G. for Ontario* v. *A.-G. for Canada* [1912] A. C. 571, at p. 581.

Government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

(1) The public debt and property. (2) The regulation of trade and commerce. (3) The raising of money by any mode or system of taxation. (4) The borrowing of money on the public credit. (5) Postal service. (6) The census and statistics. (7) Militia, military and naval service, and defence. (8) The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada. (9) Beacons, buoys, lighthouses, and Sable Island. (10) Navigation and shipping. (11) Quarantine and the establishment and maintenance of marine hospitals. (12) Sea coast and inland fisheries. (13) Ferries between a province and any British or foreign country or between two provinces. (14) Currency and coinage. (15) Banking, incorporation of banks, and the issue of paper money. (16) Savings banks. (17) Weights and measures. (18) Bills of exchange and promissory notes. (19) Interest. (20) Legal tender. (21) Bankruptcy and insolvency. (22) Patents of invention and discovery. (23) Copyrights. (24) Indians, and lands reserved for the Indians. (25) Naturalization and aliens. (26) Marriage and divorce. (27) The criminal law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters. (28) The establishment, maintenance, and management of penitentiaries. (29) Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

Exclusive Powers of Provincial Legislatures

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

(1) The amendment from time to time, notwithstanding anything in this Act, of the constitution of the province, except as regards the office of Lieutenant-Governor. (2) Direct taxation within the province in order to the raising of a revenue for provincial purposes. (3) The borrowing of money on the sole credit of the province. (4) The establishment and tenure of provincial offices and the appointment and payment of provincial officers. (5) The management and sale of the public lands belonging to the province and of the timber and wood thereon. (6) The establishment, maintenance, and management of public and reformatory prisons in and for the province. (7) The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals. (8) Municipal institutions in the province. (9) Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes. (10) Local works and undertakings other than such as are of the following classes: (*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province; (*b*) lines of steam ships between the province and any British or foreign country; (*c*) such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of

the provinces. (11) The incorporation of companies with provincial objects. (12) The solemnization of marriage in the province. (13) Property and civil rights in the province. (14) The administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts. (15) The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section. (16) Generally all matters of a merely local or private nature in the province.

Now, before leaving this division of the subject it is well to quote the words of Lord Carnarvon, the Minister in charge of the Act, speaking, on its introduction, both for the British government and for the unanimous colonial delegates:—

> The real object which we have in view is to give to the central government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces; and, at the same time to retain for each province . . . ample . . . measure of municipal liberty and self-government. . . . I ought to point out that . . . the residue of legislation, if any, unprovided for in the specific classification . . . will belong to the central body. It will be seen under the 91st clause that the classification is not intended to ' restrict the generality ' of the powers previously given to the central parliament, and that those powers extend to all laws made ' for the peace, order and good government ' of the federation.[6]

To sum up:

(1) The British North America Act, in the distribution of legislative powers, amply carried out both in spirit and in terms the Resolutions of the London Conference.

(2) The opening words of section 91 (' It shall be lawful . . . legislatures of the provinces ') are undoubtedly the *enacting* words.

(3) The words following in section 91, next in order after the ' opening words,' are not *enacting*, but *declaratory*.

(4) The twenty-nine enumerated classes of subjects in section 91 are set down ' for greater certainty ' of ' the foregoing terms,' and they must not be used ' to restrict the generality ' of these terms.

(5) The final words of the section (' And any matter . . . ') undoubtedly refer, as a matter of construction, to clause 16 of Section 92.

Thus, to borrow the words of Mr. Justice Frankfurter, I have attempted up to this point to regard rather ' the constitution itself and not what we have said about it.'[7] The federal powers are wholly residuary for the simple reason that the provincial powers are exclusive; and the twenty-nine ' enumerations ' in section 91 cannot add to the residue; they

[6] This speech *in extenso* can be conveniently consulted in Hardinge, *The Fourth Earl of Carnarvon* (Oxford, 1925), vol. III, p. 305.

[7] *Graves* v. *New York ex rel. O'Keefe* (1939) 306 U. S. 466, at p. 491.

cannot take away from it. They are there, as I have pointed out, to satisfy the London Resolutions (No. 28). They have no meaning except as examples of the residuary power, which must be as exclusive as is the grant of legislative powers to the provinces. The enumerated examples of the residuary power cannot occupy any special place; they cannot be exalted at the expense of the residuary power, for that would 'restrict the generality' of that power. It all looks reasonably simple, and Sir John A. Macdonald was perhaps justified as he looked at the scheme in hoping that 'all conflict of jurisdiction'[8] had been avoided.

Thus, we have a scheme of the distribution of legislative powers, which, in its terms, gives local matters to the provinces—we note how every provincial class of subjects is carefully qualified as 'of the province,' or 'in the province,' or 'for provincial purposes'—with an undefined residue to the federal legislature. In other words, classes of subjects of a Canadian nature—'matters of common interest'—are federal, while to the provinces belong certain enumerated and local matters. No field of law is distributed; each authority is given powers 'in relation to matters.' It is obvious that on construction some provincial matters may assume a national aspect, and that the judicial process must then be called in aid to resolve the problem of the legislative jurisdiction, when a statute in relation to some 'matter' is in dispute.

(*b*) The Process of Interpretation

We must bear first of all in mind that the final interpretation of the *locus* of legislative powers under the British North America Act, 1867, lies at present with the Judicial Committee of the Privy Council. This is neither the place nor the occasion to discuss the reasons which govern the exercise of this jurisdiction. It is only sufficient to recall that its continuance is due to Canadian and not British wishes, and that there is ample evidence that it will not survive indefinitely. Indeed, public opinion forced the Canadian cabinet in 1940 to refer the matter of where the power lay to abolish it to the Supreme Court of Canada, and that Court decided that the Canadian parliament had full powers to abolish *all* appeals to the Judicial Committee.[9] This reference has not yet gone to the Judicial Committee for final decision on account of the war, but an interesting employment of it as supporting authority can be found in the Ontario Court of Appeal in 1942.[10]

Secondly, we must recall that the British North America Act is a statute and the Judicial Committee has uniformly professed to apply to it the rules of statutory interpretation.[11] As a consequence, the Judicial

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[8] Kennedy, *op cit.*, at p. 559.

[9] *Reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 entitled 'An Act to amend the Supreme Court Act,'* [1940] S. C. R. 49.

[10] *Montreal Trust Co.* v. *Abitibi Power Co.* (1942) O. R. 321, at pp. 340—41 (*per* Masten J.A.).

[11] The principle is as old as 1887. See *Bank of Toronto* v. *Lambe* (1887) 12 App. Cas. 575, at pp. 579, 587.

Committee has merely glanced at times at the Quebec Resolutions of 1864—a somewhat inexplicable procedure in itself seeing that the London Resolutions of 1866, the very existence of which were for long apparently unknown to the Judicial Committee,[12] are alone worthy of such consideration. However that may be, not once has the *ratio decidendi* turned on the study of external aids. I am not entering into that problem, except to suggest that, seeing that the British North America Act was in essence an ' agreed ' statute, ' external aids ' from the London Conference might well be called in aid as some evidence at least of the surrounding circumstances in which the Act was passed.[13] Students of American constitutional law will at once recognize the differences in expounding the Constitution by the Supreme Court of the United States, where in addition to the use of external aids, the exposition is that of a ' constitution.' In only one case do we find any attempt to construe the British North America Act from the latter point of view. In *Edwards* v. *The A.-G. for Canada*,[14] the Lord Chancellor laid it down that the Judicial Committee has no desire to narrow the provisions of the Act by a technical construction, but were prepared to give them the large and liberal interpretation of a consittution. His Lordship, however, enters a *caveat* in relation ' to the question of the legislative competence either of the Dominion or its Provinces under ss. 91 and 92 '[15]—the central problem. It is true that Lord Sankey quoted himself, speaking in the *Edwards Case* in *British Coal Corporation* v. *The King*[16] in 1935, without the *caveat*. The quotation, however, is not part of the *ratio decidendi*, and it would seem that the sections governing the distribution of legislative powers remain subject to the rules of statutory interpretation. Lord Sankey, indeed, once quoted the parliamentary debates—Lord Carnarvon's speech already referred to; but the example is isolated. We must presume, as His Lordship did not disclose the source either by reference or punctuation, that the occasion cannot be taken as a justification for a new practice.[17]

In approaching the consideration of cases which have become fundamental, I do so with great respect, and I hope with that critical good faith

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[12] During the argument in *Toronto Electric Commissioners* v. *Snider* [1925] A. C. 396, Lord Haldane agreed that there was no Conference after that at Quebec in 1864. His agreement was evidently based on what he said in *Great West Saddlery Co.* v. *The King* [1921] 2 A. C. 91, at p. 116; ' as matter of historical curiosity . . . the resolutions on which the British North America Act was founded . . . were passed at Quebec on October 10, 1864 . . .' As a matter of historical curiosity, the British North America Act was not based on these Resolutions, but, as we have seen, *expressly* and *explicitly* on those of the London Conference of 1866. See Lord Sankey L.C. in *Edwards* v. *A.-G. for Canada* [1930] A. C. 124, at p. 136.

[13] See *Eastman Photographic Company* v. *Comptroller-General of Patents* [1898] A. C. 571, at p. 575 (*per* Lord Halsbury L.C.). Cf. *Macmillan* v. *Dent* [1907] 1 Ch. 107, at p. 122 (*per* Fletcher Moulton L.J.); *Assam Railways and Trading Co.* v. *C. I. R.* [1935] A. C. 445, at p. 458 (*per* Lord Wright); *Home Oil Distributors* v. *A.-G. for British Columbia* [1940] S. C. R. 444. Cf. the use of Reports of the Imperial Conferences in *British Coal Corporation* v. *The King* [1935] A. C. 500.

[14] [1930] A. C. 124, especially at pp. 136—137.

[15] At p. 137.

[16] [1935] A. C. 500, at pp. 518—519.

[17] *In re the Regulation and Control of Aeronautics in Canada* [1932] A. C. 54. The passage beginning ' It must no less ' (at pp. 70—71) is practically word for word from Lord Carnarvon's speech.

and lack of malice which Lord Atkin conceded even to newspaper men.[18] There need have been no great difficulties in the light of the clear terms of the Act. The Judicial Committee had one fundamental function, with the Act in front of them and even with all concepts drawn from the idea of ' a constitution ' absent. The object was to take sections 91 and 92 and apply their necessary terms when a statute, federal or provincial, came before them. They had merely to ascertain to the best of their ability to what ' matter ' the legislation was ' in relation to,' in pith and substance. The exact terms of the Act present no vast difficulties other than those inherent in the judicial process. The Act is, to say the least of it, far from obscure, and it worked well for at least a generation. Here, however, we must begin to summarize the evolution of a judicial process of remarkable importance, not merely in relation to its vast social consequences, but in relation to statutory interpretation itself. It is obvious, as I have said, that space forbids me going into the *minutiæ* of the judgments. My purpose will be fulfilled if I illustrate the processes, with great respect, and try to sum up the conclusions which may be reasonably drawn from them. I feel more easy in my mind about this when I remember that students of federal law are only called on to consider two hundred odd cases—a mere detail compared with the vast array of judicial opinion which illustrates the judicial process in American constitutional law.

For over twenty years the Act worked remarkably well in so far as the judicial process of interpretation could reasonably be related to its terms. In 1874, in *L'Union St. Jacques* v. *Belisle*,[19] Lord Selborne was as clear as possible about the relationship of sections 91 and 92; and he was equally clear that the concluding words of section 91 restrict the scope of clause 16 of section 92. In the following year, in *Dow* v. *Black*,[20] in 1879 in *Valin* v. *Langlois*,[21] in 1880 in *Cushing* v. *Dupuy*,[22] in 1881 in *Citizens Insurance Co.* v. *Parsons*,[23] we see at work a reasonable judicial process. I should, however, like to point out that, in the *Parsons Case*, Sir Montague Smith made certain observations of little importance to the parties to the case, but of great importance years on. He glanced at—to put it mildly—a kind of subtle dichotomy between the residual power of the Dominion and the illustrations of it in section 91; and he introduced an error of construction which was most dangerous for the future:—

> With the same object [as that of the declaratory provision—which he called ' the second branch of the 91st section '] apparently, the paragraph at the end of section 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of section 92.[24]

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[18] *Ambard* v. *A.-G. for Trinidad and Tobago* [1936] A. C. 322.
[19] (1874) L. R. 6 P. C. 31.
[20] (1875) L. R. 6 P. C. 272.
[21] (1879) 5 App. Cas. 115.
[22] (1880) 5 App. Cas. 409.
[23] (1881) 7 App. Cas. 96.
[24] At p. 108.

The statement was dangerous in the extreme; neither the clear 'grammatical construction' nor the intent of the Act has prevented serious consequences. At the moment, however, the *Parsons Case*, full though it was of many loose phrases, did no harm. Its sinister influences lay ahead.

In 1882, came *Russell* v. *The Queen*[25] (explained and followed in 1883, in *Hodge* v. *The Queen*[26]), with a reasonable and clear-cut decision fully in accord with the intent of the Act. 'The principle which [*Russell* v. *The Queen*] and the case of the *Citizens Insurance Company* illustrates is, that subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.'[27] Thus for many years we see that the judicial process was in keeping with the intent and terms of the Act. Matters of a national concern, 'matters of common interest to the whole country'—common *to all the provinces*—have not been withdrawn from federal legislative competence; and matters of a local and private nature, 'local matters,' in *a* province are assigned to the exclusive legislative competence of the province, subject to the final words ('And any . . . provinces') of section 91.

In 1893, began a very serious change in interpretation; and from that date I must summarize, if this survey is to be kept within reasonable bounds. In that year, in *Tennant* v. *Union Bank*,[28] first of all Lord Watson misquoted the Act ('shall extend' for 'extends'). Secondly, the Act gives the federal legislature power to make laws 'in relation to' matters, and says nothing about the exercise of this power as conditioned by a necessity that it shall not 'trench upon' matters under provincial legislative authority. Here we have the beginnings for Canada of that doctrine of 'implied prohibitions' which Australia was forced to repudiate.[29] Thirdly, his Lordship definitely *broke up* the federal legislative authority into *two* parts: (i) the general power; (ii) 'and also': the enumerated subject-matters. In other words, where the Act provides the enumerated subject-matters of section 91 as *examples* of the federal residual power, Lord Watson makes them an *addition* ('and also') to this residual power. This error, as will appear, led to one more absurd. By this division, he arrived at the conclusion that 'the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority.'[30] Here we have misquotation ('shall extend'); and we have the Dominion's

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[25] (1882) 7 App. Cas. 829. [26] (1883) 9 App. Cas. 117.

[27] At p. 130 (*per* Lord FitzGerald).

[28] [1894] A. C. 31, at pp. 45, 46, 47 (*per* Lord Watson).

[29] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1920) 28 C. L. R. 129. 'It is beyond any doubt that the doctrine of implied prohibitions can no longer be permitted to sustain a contention' (at p. 160). The Commonwealth of Australia Constitution Act must speak 'clear of any qualifications which the people of the Commonwealth, or, at their request, the Imperial Parliament have not thought fit to express' (at p. 142).

[30] [1894] A. C. 31, at p. 45.

one and only power—the residue of legislative powers—made subject to enumerations which are not separate and distinct subject-matters, but flow from, depend on, and are merely illustrations of the residuary grant itself. The case is of vital importance because it established a more or less fundamental line of future decisions.

In 1896, came the *Attorney-General for Ontario* v. *Attorney-General for Canada* (commonly known as the *Prohibition Case*[31]). Once more Lord Watson gives the decision of the Judicial Committee. Here we see something newer still. He had *added* the enumerated matters of section 91 to the power to legislate for 'the peace order and good government of Canada.' Now he adds the latter to the former: 'The general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada.'[32] These enumerated powers are erected into a basic position, supplemented by a general power which is only to be exercised in matters which 'are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92.'[33] All this is somewhat extraordinary; but it did not stop there. The loose language of the *Parsons Case* is now relied on to make the concluding words of section 91 ('And any matter . . . of the Provinces') refer to all matters enumerated in the sixteen heads of section 92,[34] and not to clause 16 alone of section 92. Thus a position is arrived at in which the federal residuary power—its sole and only power in the Act—is subjected to statutory examples of that power; while, in addition, Lord Watson put himself on record to the effect that the Judicial Committee must protect, guard, preserve the autonomy of the Provinces. Of course, as the Judicial Committee has interpreted the Act consequences of a serious nature might follow; but its terms, properly read and reasonably applied, would prevent any such situation arising.

After a quarter of a century of the judicial process on the terms of the Act, we find by 1896 a situation where: (i) the enumerated matters of section 91 are divorced from the introductory words on which they undoubtedly depend; (ii) the enumerated matters of section 91 are given an exclusiveness by the concluding words of the section and not by the prior *non obstante* clause; (iii) the concluding words of section 91, in clear terms and intent a limiting power on the provincial power in clause 16 of section 92, become, by application to all the clauses of section 92, a limitation on the scope of the federal legislative authority; (iv) the federal power to legislate for the 'peace, order, and good government' of Canada—its *sole* power—the residuary power—is erected into a power *separate* from its illustrations, and reduced to a position of exercise only in some extraordinary cases, and that without any exclusiveness or paramountcy as provided for in the Act.

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31 [1896] A. C. 348.

32 At p. 361.

33 At p. 360.

34 *A.-G. for Canada* v. *A.-G. for British Columbia* [1930] A. C. 111, at p. 118 (*per* Lord Tomlin).

What remains to be said is merely the history of these four aspects of the judicial process, summed up, in four propositions, by Lord Tomlin in 1929, which are of value merely in canalizing the years of confusion.[34] So strong have these four propositions become as fundamental in the judicial process that they have been categorically approved in more recent cases.[35] For a moment, in 1921, Lord Birkenhead got the terms of the Act clear—back to before 1896;[36] but Lord Tomlin's propositions continue to govern. Once only has the Judicial Committee actually protested against the situation in *Proprietary Articles Trade Association* v. *Attorney-General for Canada*, in 1931.[37] However, in that case Lord Atkin is speaking *obiter*, and his words have had no effect. In the *Board of Commerce Case*[38] in 1921, in the *Newsprint Control Case*[39] in 1923, in the *Snider Case*[40] in 1925, in the *Weekly Rest Case*[41] in 1937 we can see with ease the devious interpretations at work. Indeed the *Snider Case* is almost pathetic. We have to-day arrived at a position where (i) in fact the residue of legislative powers has practically passed to the Provinces under the provincial power over ' property and civil rights '; (ii) where the normal and usual powers of the Canadian Parliament are only those enumerated illustrations of its power in section 91 (except that the illustration mentioned as ' the regulation of trade and commerce ' is reduced to the almost absurd position of being a power which the Canadian Parliament can only call in aid of a power granted elsewhere);[42] (iii) where the miscalled ' general ' power of the Canadian Parliament (in truth in terms of the Act, its sole power) can only be employed by the Canadian Parliament in times of famine, pestilence or some extraordinary national peril—which is judicial legislation in excellent example; (iv) where the Act is regularly misquoted—extraordinary examples of using ' affecting ' for ' in relation to '—the words of the Act—can be seen, *passim*, in the judgments of the Judicial Committee on the recent series of cases on Canadian social legislation.[43] Every lawyer can appreciate the difference between legislation which ' affects ' a subject-matter, and legislation which is ' in relation to ' a subject-matter; (v) where implied prohibitions are

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[34] See previous page.

[35] *In re Regulation and Control of Aeronautics in Canada* [1932] A. C. 54, at pp. 71—72 (*per* Lord Sankey L.C.); *In re Silver Brothers* [1932] A. C. 514, at p. 521 (*per* Lord Dunedin).

[36] *Canadian Pacific Wine Co.* v. *Tuley* [1921] 2 A. C. 417, at pp. 422—423 (*per* Lord Birkenhead: ' It was contended . . . description ').

[37] [1931] A. C. 310, at p. 326 (*per* Lord Atkin: ' The view that . . . that ground ').

[38] *In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919* [1922] 1 A. C. 191.

[39] *Fort Francis Pulp and Power Company* v. *Manitoba Free Press Company* [1923] A. C. 695.

[40] *Toronto Electric Commissioners* v. *Snider* [1925] A. C. 396.

[41] *A.-G. for Canada* v. *A.-G. for Ontario* [1937] A. C. 326.

[42] This power over ' the regulation of trade and commerce ' is the one which Lord Atkin, *obiter*, would have rescued from the remarkable position assigned to it by interpretation. (See note [37], *supra*.) This effort has not been successful in that it has never been implemented by substantive judicial decisions; and so the power is relegated to a position utterly impossible to defend on the clearest terms of the Act, and one which makes any reliance on it barren and useless.

[43] On this point, see House of Commons Debates, Ottawa (April 5, 1937), 2773 *ff.*, and for a survey of these judgments, see 5 *Canadian Bar Review* (1937), at pp. 393—507.

read into the Act as, for example, where the Canadian Parliament cannot use its clear-cut, unqualified and specially protected power to tax, if by doing so it affords 'the Dominion an easy passage into the Provincial domain.'[44]

(*c*) Treaties

One of the most difficult problems which lies ahead for Canada is the making and implementing of treaties in view of the treaties which will follow the present war. I do not intend to add much to the already large literature which has gathered round this subject; but this survey, however general, would be singularly inadequate were something not said on a matter of such importance to Canada, domestically and internationally. The issues arise squarely in the interpretation of section 132 of the British North America Act of 1867:—

> The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

The section has been subject to direct judicial decision by the Judicial Committee in the *Aeronautics Case* in 1931,[45] in the *Radio Case* in 1932,[46] and in the *Labour Conventions Case* in 1937.[47] Of these cases, I shall only deal with the last in any detail.

Before doing so, it is necessary to make some preliminary remarks. First, it is necessarily conceded that the treaty-making power lies in the hands of the executive. His Majesty enters into a treaty on the advice of ministers. Secondly, a treaty cannot deprive the subject of any of his rights or impose on him any obligations apart from legislation in this connexion.[48] Thirdly, Canada normally to-day enters into treaties when His Majesty acts on the advice of 'His Majesty's Canadian government.' Fourthly, it is necessary to examine the section itself apart as yet from any consideration of the judgments. It does not deal with the *making* of a treaty, it deals with the *obligations* arising under a treaty— *i.e.*, with situations where legislation may be necessary to implement a treaty. It speaks of these obligations as those 'of Canada or of any Province thereof, as part of the British Empire' and of 'treaties between the British Empire and such foreign countries.'

I need not concern myself with the treaty-making power; the real issue lies in answering the question whether the Canadian Parliament

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[44] *A.-G. for Canada* v. *A.-G. for Ontario* (*the Employment and Social Insurance Act Case*) [1937] A. C. 355, at p. 367 (*per* Lord Atkin). For the taxing-power, see *A.-G. for Alberta* v. *A.-G. for Canada* [1939] A. C. 117, where Lord Maugham L.C. appears to modify somewhat the *primâ facie* reasoning of Lord Atkin. (See C. P. Plaxton (now Plaxton J. *Canadian Constitutional Decisions* (Ottawa, 1939), at pp. lvi—lvii, lxxi.

[45] *In re the Regulation and Control of Aeronautics in Canada* [1932] A. C. 54.

[46] *In re Regulation and Control of Radio Communication in Canada* [1932] A. C. 304.

[47] *A.-G. for Canada* v. *A.-G. for Ontario* [1937] A. C. 326.

[48] Cf. the well-known rule in *The Parlement Belge* (1879) 4 P. D. 129, which was not reversed on this point.

has power by legislation to implement the obligations of a treaty duly entered into by His Majesty on behalf of Canada with a foreign country, where the terms of the treaty are such that the implementing legislation would be legislation ' in relation to matters coming within the classes of subjects ' exclusively assigned to the provincial legislatures. Difficulties arise at once when we consider the use of the word ' Empire ' in the section. There is no such thing in law as an ' Empire ' treaty; and we must conclude that the term ' between the Empire ' in the section is a very loose substitute for ' His Majesty.' On the other hand the Judicial Committee has laid it down that an Empire treaty is one entered into by His Majesty on the advice of an ' imperial executive,' forgetting that there is no such thing as an ' imperial executive.' The control of aeronautics was conceded to the Canadian Parliament as flowing from such a treaty. The *Radio Case* need not detain us, as the Judicial Committee found that the performing of the obligations, arising under the Convention, lay with the Canadian Parliament under section 91. The *Labour Conventions Case* does not lend itself to quotations in an article and must be read as a whole. The situation seems to be this:—

(i) the Canadian Parliament can perform for Canada the obligation of a treaty where the ' performing ' legislation is ' in relation to ' the powers of Parliament under section 91;

(ii) the Canadian Parliament can perform for Canada the obligations of a treaty entered into by His Majesty on the advice of an ' imperial executive ' (*i.e.*, apparently the cabinet of the United Kingdom), even though the ' performing ' legislation is ' in relation to ' provincial legislative powers;

(iii) apart from (ii) the Canadian Parliament cannot perform the obligations of Canada if the ' performing ' legislation is ' in relation to ' provincial legislative powers.

Now, if the situation in (i) is the only meaning of section 132, then the section is quite unnecessary as it would clearly be governed by section 91. If the situation is as in (iii) then the Judicial Committee has given no meaning whatever to the words ' or of any Province thereof ' in section 132. The Judicial Committee indeed said that the federal legislature could co-operate with the provincial legislatures in the situation contemplated in (iii)—Dominion and Provinces together make Canada fully equipped by co-operation within ' the watertight compartments which are an essential part of her original structure.' The suggestion might be brushed aside as an excellent example of the divorce between judicial opinion and political and social situations. On the other hand, it is clear law, often laid down, that the Provinces cannot grant to the federal parliament legislative control over their own subject-matters; and even were they to assent in some informal way to a treaty where their subject-matters were concerned, such assent would have no international validity as the Provinces enjoy no international status in this connexion. It was, too, most unfortunate that the Judicial Committee should have imported the

treaty-making power into section 132. However, the importation leaves the situation as in (ii). If Canada fears that a proposed treaty may require legislation 'in relation to' provincial subject-matters, it will always be possible to ask, by reference, the Judicial Committee to decide in advance on the terms of such a treaty; and then, if that decision is against the treaty, to act through an 'imperial executive.' The unity of the Commonwealth would not stand the strain if the ministry of the United Kingdom refused to advise His Majesty for Canada. Thus we arrive at a position where the judicial anxiety to guard the provincial subject-matters against legislative action by the Dominion in connexion with a treaty may be rendered null and void by a mere procedural device arising solely from the conventions of the constitution.

The issues are grave. After the war, peace treaties will follow, which will undoubtedly require legislation 'in relation to' some provincial subjects. New Zealand and South Africa can enter into them without difficulties, and so can Australia, it is submitted, under the implications flowing from judicial decision.[49] Canada, however, in the light of the judgments of the Judicial Committee, cannot enter into them through advice rendered to His Majesty by his Canadian government. The situation may thus become another illustration that 'the principles of equality and similarity, appropriate to *status*, do not universally extend to function.'[50] On the other hand, Canada, as the law now stands, can enter into them if the 'imperial executive' advises His Majesty for Canada; and the treaties will thus apparently become 'Empire' treaties and satisfy the judgment in the *Labour Conventions Case.* Thus, by *executive* action in the United Kingdom, the Canadian Parliament may 'trench on' provincial subjects. I venture to submit that the interpretation of section 132 is conceived in too narrow a manner. It seems that it is beyond the scope of the section to ask upon whose advice His Majesty chooses to act in entering into a treaty in respect of Canada. It is also extreme to say, as the *Labour Conventions Case* says, that the obligations which Canada assumes are undertaken by Canada not 'as part of the British Empire' but by virtue of her new status. Surely when Canada enters into a treaty through Canadian advice rendered to His Majesty, His Majesty remains 'King of Great Britain, Ireland, and the British dominions beyond the seas,' etc., and the place of Canada as part of the British Empire is abundantly in evidence? It is almost impossible to rationalize the position. It is extremely difficult to understand why a treaty entered into by His Majesty for Canada on the advice of his Canadian executive should not be within the ambit and scope of section 132 and yet this same identical treaty should be within the scope of the section were an 'imperial executive' substituted for the 'Canadian executive.' If such be the law, then it is an outstanding example of mere constitutional conventions governing a legal situation.

[49] *The King* v. *Burgess, Ex parte Henry* (1936) C. L. R. 608.
[50] *Report of the Imperial Conference of* 1926, Part II.

What of the future? Domestically the situation is grave as the Canadian Parliament is unable to face the growing demands for social legislation arising out of the depression and accentuated by the war, and already calling for action in the light of post-war events. Had the Act been adhered to in its circumstances and terms, it could have been worked with reasonable success. As it is, we are faced with the serious suggestion that when Canada abolishes all appeals to the Judicial Committee, the Canadian Parliament should legislate to prohibit the judgments of the Judicial Committee from being binding on Canadian Courts. The idea is legally possible, but impracticable for many years at least, as it is terribly easy to follow judgments without referring to them. On the other hand, we have suggestions to re-cast the federation *in toto*—suggestions which are vitiated with doctrine and futile through theory. We shall remain a federation—and I believe that the hard facts of life will now more quickly bite into the granite of the judicial process, especially as there is a growing belief that constructive action lies in 'getting back to the terms of the Act'; and that in the compromises—the essence of federalism—of the Act, applied with the intent of its framers, and in the exact terms interpreted in a generic manner, we may progress with courage to meet the terrific demands which society will make on the Act in the years that lie ahead.[51]

May I add a concluding word? I have read much in recent years—perhaps too much—of the revival of the federal idea in suggestions for the healing of the world's sorrows. I am far from unconscious of the success of American, Australian and Canadian federalism, but with so many obvious and even elusive conditions in its favour, it is well to remember its tremendous difficulties, its ever-present uncertainties, its increasing complications, its administrative frictions, its overwhelming legalism. It is perhaps unwise to cloud hopes, to darken vision. I cannot, however, rid my mind of the League of Nations, and I would sincerely trust that neither hopes nor visions are based on federalism as any immediate solution for international anarchy. If federalism to-day works with machines charged with ponderous and fissiparous frictions in those states where there is just enough goodwill to make it work at all, it would seem that the practical political wisdom, so dear to the Greeks, ought to warn us well in advance not to trust too much to the success of the federal concept in reconstructing a disintegrated and shattered world. It is easy enough to reconstruct this world on paper—'to call spirits from the vasty deep'—but it is a Herculean task to make them 'come when you do call for them.'

[51] After years of toil and trouble, in the midst of wide unemployment, the provinces at length in 1940 agreed to an amendment to the B. N. A. Act, 1867, which transferred 'unemployment insurance' to the Canadian Parliament (3 & 4 Geo. 6, c. 36 (U. K.)). The amendment came twenty years too late.

THE LAW AND LAWYERS OF JORROCKS

H. C. Gutteridge

WORKS of fiction are often valuable as records of contemporary life, and may also be of peculiar interest to lawyers. 'It is always difficult,' says Sir William Holdsworth, 'for a legal historian to reconstruct the atmosphere of the period with which he is dealing.' Statutes, law reports and legal text-books are insufficient for this purpose because—with certain notable exceptions such as the earlier Year Books and the *De Laudibus* of Fortescue—they do not tell us much about the manner in which legal business was carried on, nor do they throw much light on the characteristics of judges and practitioners.[1] A wealth of material of this kind is, however, to be found in the writings of our English novelists though only a select few can be relied upon to present a reliable picture of the law as it was in their time. The lay writer who ventures into the domain of the law must necessarily do so at his peril. Trollope[2] was fully alive to this danger when he made the suggestion that 'writers of fiction should among them keep a barrister in order that they may be set right on such legal points as will arise in their little narratives and thus avoid that exposure of their own ignorance of the law which now, alas! they make.'

The novelists of the early nineteenth century who wrote about law and lawyers with adequate knowledge are very few, the names which stand out, in this connection, being those of Dickens, Sir Walter Scott, Thackeray, Surtees, and Samuel Warren. A good deal has been written about the Law and Lawyers of Dickens,[3] but very little, in comparison, about the contributions to our knowledge of contemporary legal life made by the other authors who have been named. Scott's novels contain many references to the law of Scotland and, in the *Fortunes of Nigel*, we even get a little comparative law. Thackeray has not a great deal to say about law and lawyers, though his descriptions of life in the Temple have never been equalled. Robert Smith Surtees and Samuel Warren, on the other hand, deal with the practical working of the law in a manner which, though artistically inferior to Dickens's pictures of the life of the law, is based on a closer acquaintance with legal technicalities.

Our present concern is with Surtees, the creator of Jorrocks, but it may perhaps be permissible to refer in passing to Warren's *Ten Thousand a Year*. This is, in many respects, a singularly odious book, packed—as Thackeray has observed[4]—with much 'florid and grandiloquent'

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[1] *Dickens as a Legal Historian*, pp. 1—4.

[2] *Dr. Thorne*, Chap. LXV.

[3] See Holdsworth, *op. cit.*, and the other works mentioned by him.

[4] *Book of Snobs*.

nonsense. Warren is the arch-snob among the novelists of his own, or any other period, and his attempt to delineate an ideal English country gentleman in the person of Aubrey would be offensive if it were not so ludicrous. But it is possible to 'skip' the clap trap which disfigures an otherwise notable book, and any lawyer who delves into the pages of *Ten Thousand a Year* will find much to reward him. Let us, for instance, take Warren's thumb-nail sketch of Weasel, a special pleader:—

'In law he lived, moved and had his being. In his dreams he was everlastingly spinning out pleadings which he never could understand, and hunting for cases which he could not discover. In the day time he was, however, more successful. In fact, everything he saw, heard or read of—wherever he was, whatever he was doing, suggested to him questions of law that might arise out of it. At his sister's wedding (whither he had not gone without reluctance) he got into a wrangle with the bridegroom, on a question stated by himself, whether an infant was liable for goods supplied to his wife before marriage; at his grandmother's funeral he got into an intricate discussion with a puzzled proctor about *bona notabilia* with reference to a pair of horn spectacles which the venerable deceased had left behind her in Scotland, and a poodle in the Isle of Man; and at church the reading of the parable of the unjust steward set his devout, ingenious and fertile mind at work for the remainder of the service, as to the modes of stating the case now-a-days against the offender, and whether it would be more advisable to proceed civilly or criminally and if the former, at law or in equity.'

Surtees had, however, much more in common with Dickens, the layman, than with Warren, the lawyer. Warren was in no way troubled by the state of the law in his day; in fact, he regarded it with what is sometimes, though unjustly, described as 'Blackstonian complacency.' Surtees, on the other hand, had a keen sense of the anomalies and abuses which hampered the administration of justice and this led him at times to overdo the element of ridicule and caricature. But, he had the gift of creating an atmosphere of reality. Thackeray was able to say of Surtees's most famous novel, *Handley Cross*, 'I have lived with Jorrocks in Coram Street.' A similar tribute could not be paid to Warren.

Robert Smith Surtees was born in 1803 and was educated at Durham School. After serving his articles to a Newcastle solicitor and to Mr. William Bell of Bow Churchyard in London he was admitted as an attorney and solicitor. He purchased a partnership share in a firm of solicitors and practised, but only for a brief period. He considered that he had been deceived as to the value and extent of the practice and the deed of partnership was cancelled. As one of his biographers remarks: 'he succeeded with characteristic pushfulness in recovering the purchase money he had paid out.'[5] This misadventure appears to have deterred him from any further attempts to engage in practice, and as he had abundant means of his own, he decided to combine literary pursuits with the usual activities of a country gentleman in the rural parts of Northumberland. His first published work was a law book, *The Horseman's Manual; being a Treatise on Soundness, the Law of Warranty,*

[5] A. F. F. in the postscript to the subscription edition of *Hawbuck Grange*.

and generally on the Laws relating to horses.[6] He subsequently became editor of the *New Sporting Magazine*, in which he wrote a series of sketches of John Jorrocks, a sporting cockney grocer. These met with very great success, and later on were published in book form as *Jorrocks's Jaunts and Jollities*. The suggestion has been made that Chapman and Hall were inspired by the popularity of this work to commission Dickens to write a book which should provide the text for certain illustrations by Seymour dealing with the adventures of cockney sportsmen and that it was thus that Pickwick came into being. How far this suggestion has any foundation is a matter which lies outside the scope of this attempt to deal with Surtees's writings from the angle of the law. Its only relevance to our purpose is that one of the features of the *Jaunts and Jollities* was a trial scene, namely, the hearing of an appeal at the Croydon Quarter Sessions, and that the leading figure in it is one Serjeant Bumptious, who presents a very strong family resemblance to Buzfuz; in fact it is not beyond the bounds of possibility that the *Jaunts and Jollities* may have planted the seeds of imagination in Dickens's mind which ultimately came to fruition in another form in the trial scene in *Bardell* v. *Pickwick*.

The *Jaunts and Jollities* were followed by a series of novels from Surtees's pen which are of varying merit. Those which are most widely read at the present day are *Handley Cross*, *Mr. Sponge's Sporting Tour*, *Facey Romford's Hounds* and *Ask Mamma*. Of these the first is the only one to touch extensively on legal matters; the others contain very few references to the law or to life in the law. On the other hand, two of Surtees's less popular novels, *Hillingdon Hall* and *Plain or Ringlets*, are of importance for our purpose because they shed some light on a topic with which Surtees was very familiar, namely, the part played by the Justice of the Peace and the country solicitor in the rural life of England in the early Victorian era.

The success or otherwise of a writer of fiction who deals with the law depends largely on the impression which he is able to make on the general reading public as a narrator of proceedings in open court. For this reason it is proposed to commence with an attempt at an appreciation of the various trial scenes which are to be found in Surtees's novels and then to pass on to deal with his portrait gallery of lawyers.

The court scenes in Surtees's novels are as follows:—first in importance is the trial of the action of *Doleful* v. *Jorrocks*[7] at the Walsington Assizes; the second, is the inquiry before the Commissioners in Lunacy into Jorrocks's state of mind;[8] the third is the appeal by Jorrocks to Quarter Sessions against a conviction and fine for trespassing in pursuit of game;[9]

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[6] 1831: Alfred Miller, 137 Oxford Street. This work is a blend of law and veterinary science. 'Surtees had a keen legal as well as a personal eye for a screw. It must be remembered that before 1830 it was not customary to have a veterinary surgeon to examine a horse, and the field for horse copers was in consequence both lucrative and becoming more promising every year.' Watson, *Robert Smith Surtees*, p. 193.

[7] *Handley Cross*, Chap. LVII.

[8] *Handley Cross*, Chaps. LIX, LX and LXI.

[9] *Jorrocks's Jaunts and Jollities* (Surrey Shooting).

and the fourth is the 'swearing in' of Jorrocks as a Justice of the Peace at the Sellborough Quarter Sessions.[10]

Surtees's descriptions of these scenes are graphic and the technical details are set out with great fidelity, but in none of them can he be said to have gained a hold on the public imagination in any degree comparable with the success of Dickens's two masterpieces, *Bardell* v. *Pickwick* and *Jarndyce* v. *Jarndyce*. When Surtees made up his mind that Doleful should sue Jorrocks he missed a great opportunity, and it was an undoubted error of judgment on his part to select as the cause of action a claim for damages for breach of warranty on the sale of a horse, even though that horse was one of that immortal pair, 'Xerxes' and 'Arterxerxes.' He seems to have thought that 'a case about a horse would amuse his readers,' and, 'as the author of the Horseman's Manual, he gave them the full benefit of his knowledge,[11] though with unfortunate results.' 'Dickens,' says one of Surtees's biographers,[12] 'even had he known law would never have made such an error. He dealt not in facts, but in humanities.'

Surtees, in other words, failed where Dickens succeeded, namely, in the popularisation (or to use the French term, the '*vulgarization*') of the law. Dickens was just enough but not too much of a lawyer,[13] and this enabled him to clothe his descriptions with verisimilitude without destroying their artistic effect. He was sufficiently familiar with the ins and outs of legal practice and the jargon of the law to secure substantial accuracy in his pictures of life in the law without putting them beyond the comprehension of his readers or blunting the edge of his humour.

Surtees, on the other hand, was unable to subordinate legal technicalities to the requirements of works of fiction designed for popular consumption. His mentality is throughout that of a lawyer. For instance, he puts into the mouth of Jorrocks, a person of scant education and less Latinity, such phrases as '*Qui Tam*'[14] and '*Sed Quaere*,'[15] which are not to be comprehended by the profane. Then again, one wonders how many of the readers of *Plain or Ringlets* were able to appreciate the delicate humour of the description of Pretty Perker, the lady's maid who 'smiles attornment to the coming authority' of her mistress's fiancé.

But as lawyers we need not concern ourselves unduly either with the merits or the demerits of Surtees as a popular writer, because it is this very legalism which keeps cropping up to the surface in his novels that lends peculiar interest to his descriptions in our eyes. Let us, for example,

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[10] *Hillingdon Hall*, Chap. XIX.

[11] Surtees's law appears to be accurate, but he made at least one blunder, *i.e.*, when Doleful is sued in the County Court for failing to pay a subscription promised by him to James Pigg's testimonial 'on the assurance that it would never be called for.' (*Handley Cross.*)

[12] Watson, *op. cit.*, p. 32.

[13] He served for a time as an unadmitted clerk in two firms of attornies, and had also reported cases in Doctors Commons.

[14] *Handley Cross*: 'what lawyers call *qui tam* 'osses, that is to say, 'osses wot will ride as well as drive.'

[15] *Hillingdon Hall*: '*sed quaere*, as us lawyers say.'

take his account of the trial of an action at *nisi prius* in *Doleful* v. *Jorrocks*. In no other work can one find so complete a picture of a trial of this description—not even in *Bardell* v. *Pickwick* or in Warren's ejectment action of *Doe* d. *Titmouse* v. *Jolter*.[16]

As already mentioned, the cause of action was the breach of a warranty of soundness on the sale of a horse and the trial takes place at the Assizes before a Judge and a Special Jury. The plaintiff's allegation was that Jorrock's servant, James Pigg, had given the warranty orally having ostensible authority to do so, but that Xerxes, the horse in question, was suffering at the time from an incurable disease. Surtees's *mis en scène*, of the trial is very accurate and complete. The Assizes are opened with the time-honoured ceremonial of trumpeters, halberdiers and all the rest of it. We are then admitted to the Grand Jury Room and are shown how ' true bills ' were found. A century has passed since Surtees penned his description of a Grand Jury at work, but it shows that there must have been many, even at that distant date, who entertained doubts as to the utility of that ancient feature of our legal system. We then pass into the Assize Court where the gentlemen of the Bar are assembled and these are described in a brilliant piece of writing. When *Doleful* v. *Jorrocks* comes on for hearing the course of a trial at *nisi prius* is described with great fidelity, although with the accompaniment of a certain amount of burlesque, which must be regarded as inevitable in any transaction in which Jorrocks and his henchmen, James Pigg and Binjimin, were called upon to participate. When the evidence, the speeches of counsel and the summing up are concluded we accompany the twelve good men and true into their retiring room and learn how the verdicts of juries are sometimes arrived at. Surtees had served in the office of High Sheriff of his county and there can be no doubt that he wrote from first-hand knowledge of the proceedings at Assizes in his time.

It is, no doubt, rash to attempt any comparative estimate of the respective merits of the trial scenes in *Doleful* v. *Jorrocks* and *Bardell* v. *Pickwick*, but it may, perhaps, be permissible to say this much. Regarded from an artistic standpoint *Bardell* v. *Pickwick* is supreme; it is a masterpiece of scintillating humour which has rarely, if ever, been surpassed. It is also a vivacious and arresting narrative of the course of a Common Jury action in the early thirties of the last century. *Doleful* v. *Jorrocks* in comparison is long drawn out and dull, but it is also—so far as accuracy of presentation is concerned—far in advance of *Bardell* v. *Pickwick*. The element of comedy is, of course, the predominating feature of both trial scenes, but there is very little in the narrative of *Doleful* v. *Jorrocks* which might not have happened in real life. On the other hand, caricature is pushed in *Bardell* v. *Pickwick* to an extreme. It is inconceivable that any judge would have permitted Buzfuz to behave as he did or have allowed the celebrated ' Chops-and-Tomato-Sauce ' letter to be laid

[16] *Ten Thousand a Year*, Chap. XIII.

before a jury as a serious piece of corroborative evidence. It has been claimed for *Bardell* v. *Pickwick* that it could serve as a model ' to which the student-at-law could be referred by readers and lecturers for a reliable account of the practical working of the law of personal actions when Queen Victoria ascended the throne.'[17] But with all due reverence to the memory of the very learned and witty lawyer who was the author of this statement, even if we concede the somewhat doubtful point that a work of fiction can be ' reliable ' for the purpose, the trial scenes in *Doleful* v. *Jorrocks* and *Doe* d. *Titmouse* v. *Jolter* would appear to be much better adapted for the instruction of the student than the rollicking pantomime which was performed at the Guildhall in the presence of Mr. Justice Stareleigh.

Doleful v. *Jorrocks* was tried by Baron Botherem with the assistance of a Special Jury, ' men who have little to do in court and less at home, and yet think themselves desperately oppressed by being called on at all.' The jury was composed of ' five top-booted and five trousered esquires ' and ' two gentlemen in drabs and continuations described in the panel as merchants.' The reference here is to the provisions of the County Juries Act, 1825, which *inter alia* defined a special juror as a person who was legally entitled to be called an esquire or happened to be a banker or merchant. The trial began at a late hour by candle light because ' some judges consider special jury cases as peculiarly the property of the rich, consequently have no compunctions about letting them remain to the last.' The case for the plaintiff was opened by Mr. Burley Bolster Q.C. who had a somewhat difficult task to discharge. At that date the evidence of Doleful, the plaintiff, to whom the warranty of the soundness of Xerxes was alleged to have been given by James Pigg on behalf of Jorrocks, was inadmissible,[18] and Burley Bolster was consequently driven to rely on evidence of an extremely unsatisfactory nature. James Pigg was put into the box but proved to be quite as intractable though not as astute as Sam Weller. The other witnesses turned out to be unreliable. Binjimin, Jorrocks's boy of all work, stated that he had been playing cards at the time in a loft over the stable and had heard Pigg giving the warranty, but when cross-examined by Mr. Chargem Q.C. for the defendant, he displayed so much spite against Pigg as to render his evidence doubtful in the extreme. The Veterinary Surgeon who was called to prove the nature of the disease from which Xerxes was suffering was forced to admit that he was an unqualified man, and altogether when the plaintiff's case was closed it was in a somewhat sorry state. Bolster made a valiant effort to get home on a point of law. He cited a somewhat doubtful case[19] and also endeavoured

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[17] Theobald Mathew, in L. Q. R., Vol. XXXIV, at p. 320.

[18] It will be remembered that Pickwick was similarly debarred from entering the witness box. Holdsworth, *op. cit.*, gives an interesting account of the origins of this rule and its subsequent abolition. See also the observations of A, T, Lawrence J, in *Scarpetta* v. *Lowenfeld* (1911) 27 T. L. R. 509.

[19] *Helyear* v, *Hawke* (1803) 5 Esp. 72,

to make the point that, even if no express warranty was given, there was nevertheless an implied warranty that Xerxes should be fit for use as a horse. This contention was foredoomed to failure because at common law there could not be any implied warranty of fitness as to goods which were *in esse* and had been inspected by the buyer before entering into the contract of sale.[20] The final blow was administered to the plaintiff's case by a witness, called for the defence, who had been a participant in the card game and contradicted Binjimin's evidence, and by expert evidence which proved that Xerxes died as the result of overwork by Doleful and by being housed in a damp stable together with a performing monkey and a bear. Baron Botherem summed up to the jury very briefly, making the observation that it was ' a most perplexing case and one that we who have passed our lives in courts of law, are but ill calculated to unravel. I would rather try ten insurance cases than one horse cause.'

The jury then seize their hats and coats and

' whilst the usher is swearing the bailiff to keep them in some safe place, without meat drink or fire—candle light only excepted—until they agree upon their verdict, they betake themselves from the heated atmosphere of a suffocating court, to the chilly vault-like dampness of the retiring room; a rough deal table, with a bench on each side, is all the accommodation that greets them, while a single candle, showing the massive grating of a lofty window and the dull clank of the lock, as the bailiff turns the key on them, remind them of the importance of an early agreement of their verdict. Twelve strangers are thus left to make each other's acquaintance by arriving at the same conclusion.'

Agreement is not reached until dawn. A certain Mr. Strong, who seems to have been the foreman of the jury and was one of the gentlemen described in the panel as merchants, attempted to secure a verdict for the plaintiff. He was under obligations to Doleful, the Master of the Ceremonies at Handley Cross Spa, for finding partners at dances ' for his plain daughters.' It may be assumed with some confidence that the ' five top-booted esquires ' would be pro-Jorrocks and that the other five esquires ' in trousers ' probably felt very much the same. In any event Strong met with little support and cold and hunger eventually destroyed the morale of those who were on his side. At half past four in the morning he stood alone and gave in and the jury returned into Court.

' How changed the scene ! The heated hall is cleared—Mr. Jorrocks sleeps in the Judge's chair, his wig is awry—James Pigg and the crier are nodding back to back in the witness box—Binjimin is curled up on the bar table—and the Attorneys and their clerks are huddled together at opposite corners, lest they should fight in their sleep. A crier is found in the bottom of the reporter's box—and the officer left to take the verdict being summoned from his coffee in the gaoler's house hurries in with Captain Doleful and hears a verdict for the defendant.'

The second trial scene concerns the inquiry into Jorrocks's state of mind before the Commissioners in Lunacy and a Jury. Surtees, for some

[20] See *Benjamin on Sale* (7th ed.), p. 651.

inexplicable reason devoted three chapters of *Handley Cross* to this episode. These make very poor reading and detract considerably from the merits of a book which, with all its faults, is in the first rank of the works of our English comic writers. These three chapters are tedious in the extreme; the attempts at humour are very definitely second rate and illustrate the uneven quality of much of Surtees's work. He thought, no doubt, that his readers would be entertained, but it is difficult to avoid the conclusion that his object was sometimes more to please himself than to amuse others. In this particular instance he appears to have been at pains to pour ridicule on opponents of fox hunting. But be this as it may, these chapters have two redeeming features, namely, Leech's illustration of James Pigg in the witness box and an excellent pen picture of the ultra-pedantic type of barrister in the person of Mr. Martin Moonface. Otherwise this trial scene is mere shapeless buffoonery.

Judicial Inquisitions as to Lunacy are now rare because modern legislation has rendered them superfluous. They appear in practice to be confined to cases in which it is sought to prevent a person who is *non compos mentis* from entering into matrimony and to cases in which a person resident in England is of unsound mind and owns property in some other jurisdiction, such as Eire, which requires a finding of lunacy by inquisition before proceedings for the custody of the property can be initiated. From 1925 to 1934 inclusive only sixteen such inquisitions were held.[21]

In the early Victorian era these inquisitions were more common and took place before a Commission appointed by letters patent under the Great Seal issuing from the common law side of the Court of Chancery.[22] The Commissioners sat with a jury and the procedure was, in the main, the same as in a common law action. The Commission which dealt with Jorrocks opened in the long room of the old Gray's Inn Coffee House in Holborn. After the jury had been sworn the order appointing the Commission was read and we then get lengthy and dreary speeches by Counsel, a mass of evidence which is neither interesting nor amusing, a summing up by the presiding Commissioner and finally the verdict of the jury pronouncing Jorrocks to be insane.

The account given in *Jorrocks's Jaunts and Jollities*[23] of the hearing of an appeal at the Croydon Quarter Sessions is more interesting and entertaining. Jorrocks had appealed against a fine of one guinea imposed on him by Mr. Boreem J.P. for trespassing on Squire Cheatum's land in pursuit of a hare. The conviction was on an information laid by a gamekeeper under the Game Act, 1831, and the short point in the case was whether Jorrocks's big toe was over the boundary line between Cheatum's land and the adjoining property when the shot was fired. There was a very large attendance of magistrates who ' all came in new

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[21] Halsbury's *Laws of England* (Hailsham ed.), Vol. XXI, p. 271, note (*q*).
[22] Holdsworth, *History of English Law*, I, 475.
[23] *Surrey Shooting*,

hats and sat on the Bench looking as wise as gentlemen judges generally do.' The reference to the hats is explained by Surtees in a footnote which mentions the privilege claimed at that date by magistrates of keeping their hats on in Court. The morning is taken up by the hearing of one hundred and twenty-two affiliation cases (this was the era of the old poor law) and, when these had been disposed of, the chairman, Mr. Tompkins, moved the order of the day and Jorrocks's appeal comes on for hearing. This was the 'signal for half the magistrates to pull the newspapers out of their pockets, and the other half to settle themselves down for a nap, all the sport being considered over when the affiliation cases closed.' No evidence was called and the proceedings consist entirely of speeches by counsel. When these were concluded:—

'the silence that followed had the effect of rousing some of the dozing justices, who nudging those who had fallen asleep, they all began to stir themselves and having laid their heads together, during which time they settled the dinner hour for that day and the meets of the stag hounds for the next fortnight, they began to talk of the matter before the court. "I vote for reversing," said Squire Jolthead, "Jorrocks is such a capital fellow." "I must support Boreem," said Squire Hicks, "he gave one a turn when I made the mistaken commitment of Gipsy Jack." "What do you say, Mr. Giles?" inquired Mr. Tomkins. "Oh, anything *you* like, Mr. Tomkins." "And you, Mr. Hopper?" who had been asleep all the time. "Oh, guilty, I should say, three months at the treadmill—privately whipped if you like," was the reply. Mr. Petty always voted on whatever side Bumptious was counsel—the learned serjeant having married his sister—and four others always followed the chairman.'

In such circumstances it is not surprising that the appeal was dismissed.

The only other Court scene described by Surtees is the occasion on which Jorrocks took the oath as a Justice of the Peace at the Sellborough Quarter Sessions.[24] 'The Court was in full flower when Mr. Jorrocks entered. The Chairman, a red-hot Tory, sat with his hat on, with three brother Tories on his right, and a solitary Whig on his left.' The clerk to the Court produced 'a great skin of parchment' and administered the various oaths which are set out in full detail. The Bench then proceeded to hear the case of Mortimer Green against John Tugwell, an information charging the respondent with having put his ass into a field of oats belonging to the prosecutrix. Surtees devotes a good deal of space to this case, but it cannot be described as particularly interesting or amusing. It seems as though he may have been giving the facts of some case which had come before him in his capacity as a Justice and that in real life the personal characteristics of the parties—which he failed to reproduce in print—had been a source of entertainment to him and that he endeavoured, though without success, to pass them on to his readers.

Surtees's Court scenes, even when they fail to interest or amuse, are not without value in so far as they convey a general impression of the surroundings in which legal proceedings were conducted in the early Victorian period. Surtees has few rivals as an acute and well-informed

[24] *Hillingdon Hall*, Chap. XIX.

observer of an age which saw the decay of English agriculture and the triumph of the industrial regime. 'The whole structure of the territorial and feudal autocracy was in retreat'[25] and the growing power of the middle class was beginning to make itself felt. The impetus towards reform was rapidly gaining in strength and the antiquated mechanism of the law was no longer being acquiesced in as an unalterable element in our system of government. It cannot be claimed for Surtees that he was a law reformer in the sense in which that phrase has been applied to Dickens, but he was an unsparing critic of the abuses which he encountered and this criticism coming from one who was very definitely 'on the right' in politics cannot have been without considerable effect.

We now pass from Jorrocks's law to Jorrocks's lawyers. Surtees, himself a lawyer, was no great admirer of his professional colleagues. He was the author of the well-known saying that 'there are three sorts of lawyers—able, unable, lamentable.'[26] His contact with practice was limited, because he abandoned his professional career soon after its commencement, but he had a wide knowledge of other aspects of the law derived from his experience as High Sheriff and Justice of the Peace.

With one or two exceptions Surtees does not give more than a passing glance to the Judges of the Courts at Westminster though, as we shall see hereafter, he has more to say about Justices of the Peace and about the Bar and his own branch of the legal profession. Only two puisne judges are in fact mentioned, namely, Barons Botherem and Funnyfile. We are told very little about Baron Funnyfile, beyond the fact that he had a 'cauliflower wig' and a 'laughing eye,' and still les about Baron Botherem. It is, therefore, difficult to identify them; the only clues being that they were both Barons of the Exchequer and that Botherem appears to have been a commercial lawyer as he expressed a strong preference 'for insurance cases over horse causes' when summing up in *Doleful* v. *Jorrocks*.

The Lord Chancellor makes a brief appearance in *Handley Cross* when an application is made to him for the release of Jorrocks from the asylum in which he had been confined as the result of the verdict of the jury in the lunacy proceedings. Surtees must have had Lord Lyndhurst in mind because there was no other Lord Chancellor of the period who fits the description or who could have shown so much tact in dealing with that extremely difficult person Jorrocks.

Counsel as described by Surtees are a representative selection, including both the Common Law and the Chancery Bar and their clerks. Here is his description of the Bar at the Walsington Assizes:—

'There is the leader with a bag full of briefs; not a cause is called on but he is engaged; the judge lends his ear, and the fawning juniors flutter at his frown. Next him, with whiskers matching the colour of his wig, is one whose day is gone by—

[25] Watson, *op. cit.*, p. 218.

[26] *Plain or Ringlets.*

whose well-stored bag has dwindled to a single brief, the winter of whose discontent is sharpened by the recollection of the prosperity he once knew. The rosy-gilled gentleman on his left is a country practitioner, who reaps a small harvest at assizes and sessions, without enduring the pangs of Westminster Hall, the turmoil of the circuit or the confinement of inn-chambers. Another great leader follows on, sallow, solemn, and careworn; and then comes a long file of juniors, with health ripening on each brow, until we come to the pink and white youth with the wig and gown of yesterday.'

This is a perfect picture and *mutatis mutandis* as true at the present time as it was at the date when Surtees penned these words.

The 'leader' among Surtees's barristers is undoubtedly Serjeant Bumptious, 'a stiff bull headed little man, desperately pitted with small pox.' The extent to which Dickens and Surtees derived inspiration from one another's writings is a controversial matter which does not concern us here, but it is obvious that they must have made use of the same material on occasion and the most striking proof, perhaps, of this is to be found in the fact that both seem to have fixed on the same prototype of the tub-thumping counsel of the day. It is well known that Serjeant Bompas furnished the model for Buzfuz, and there seems to be no doubt that this is also true of Bumptious who appeared for the prosecution in Jorrocks's appeal to the Croydon Quarter Sessions. The *Jaunts and Jollities* in which Bumptious is figured, was published in the *New Sporting Magazine* some years before the publicationof *Pickwick*, so Surtees is absolved from any possible charge of plagiarism. The environment is different in each instance.

Bumptious is addressing Quarter Sessions and not a jury, but the type of eloquence to which he gives vent is identical with that which Buzfuz would have employed. This is how he opened the case in support of the conviction:—

'Five and thirty years have I passed in Courts of Justice, but never during a long and extensive practice have I witnessed so gross a perversion of that sublimest gift called eloquence, as within the last hour,'—here he banged his brief against the table, and looked at Mr. Smirk who smiled—'I lament, sir, that it has not been employed in a better cause,—(bang again and another look). 'My friend has, indeed, laboured to make the worse appear the better cause—to convert into a trifle one of the most outrageous acts that ever disgraced a human being or a civilized country. Well did he describe the importance of this case !—important as regards his client's character—important as regards this great and populous county—important as regards those social ties by which society is held together—important as regards a legislative enactment, and important as regards the well being and prosperity of the whole nation '—(bang, bang, bang). 'I admire the bombastic eloquence with which my learned friend introduced his *most distinguished client*—his most delicate minded, sensitive client. Truly to hear him speaking, I should have thought he had been describing a lovely blushing young lady, but when he comes to exhibit his paragon of perfection, and points out that great, red-faced, coarse, vulgar-looking lump of humanity' (here Bumptious looks at Jorrocks as though he would eat him) 'sitting below the witness box and seeks to enlist the sympathies of your worships on the Bench—of you, gentlemen, the high-minded, shrewd, penetrating judges of this important case'—(and Bumptious smiled and bowed along the Bench upon all whose eyes he could catch)—'on behalf of such a monster of iniquity, it does make one blush for the degradation of the British Bar' (bang—bang—bang)—Jorrocks

here looked unutterable things. 'Does my learned friend think by displaying his hero as a fox-hunter, and extolling his powers in the field, to gain over the sporting magistrates on the Bench? He knows little of the upright integrity—the uncompromising honesty—the undeviating, inflexible impartiality that pervades the breast of every member of this tribunal, if he thinks for the sake of gain, fear, favour, hope or reward to influence the opinions much less turn the judgment, of any one of them.'

Surtees tells us rather more about Mr. Martin Moonface Q.C. who appeared for the promoters in the inquisition in lunacy. Although it is not possible to identify Moonface the portrait must have been drawn from life. He is described as 'the celebrated Chancery lawyer' and as being 'solemn' and having 'a deep and sonorous voice.' As befits a member of the Chancery Bar he was a scholar and his speech to the jury contains references to the Laws of Solon, to a passage in the Digest[27] concerning *prodigi* and *furiosi* and to Coke and Blackstone. The Roman Law was cited in the original Latin, no doubt to the great edification of a jury which included a dustman, a greengrocer, a cheesemonger, and a shoemaker, as well as a publican and several other tradesmen.[28] It must be confessed that Mr. Moonface was somewhat of a humbug as witness the following passage from his opening speech:—

'I do not know that I can call to my recollection,' said he, 'ever arising to address twelve honest Englishmen with such mingled feelings of gratification and regret as I experience at the present moment.' Here he paused and ran his eyes along the jurymen to catch a soft one, to whom he could more particularly address himself. Having selected Mr. Rounding, the cheesemonger whose ample bald head and staring blue eyes gave sufficient evidence of vacancy he proceeded:—'Gratification that I should have the advantage of so intelligent—so enlightened—so conscientious a jury, to weigh with poiseless balance the niceties, the delicacies, the subtleties, the intricacies of this complicated case; and regret—deep and poignant regret—that such a step as the present should be found necessary against so meritorious and amiable an individual as the unfortunate gentleman against whom I now appear.' Here Mr. Martin Moonface heaved a heavy sigh and looked at the back of his brief on which was marked '50 guineas.' 'Believe me when I say that nothing but that high sustaining power, the moral consciousness of doing right could induce me to undertake so thankless—so ungracious a task.'

At the trial of *Doleful* v. *Jorrocks* at the Walsington Assizes the plaintiff was represented by Mr. Burley Bolster Q.C. 'a large pasty-faced gentleman, in silver-rimmed spectacles and a patent wig,' who presented an ample front to the jury. His junior was the Hon. Mr. Lollington. For the defendant there appeared Mr. Chargem Q.C. with a junior who is not named. None of these learned gentlemen creates an impression on the reader's mind in any way comparable to that left by the celebrated quartette in *Bardell* v. *Pickwick*. Bolster is a leader of the bombastic type such as in days of old was prepared to 'pull up the floor of the Court for ten and two,' as the saying went. Chargem, on the other

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[27] D.27. 10. 1. pr.; Ulp. L. 10 ad Sabinum.

[28] The definition of a 'rioter' by Mansfield C.J. in *Clifford* v. *Brandon* (1809) 2 Camp. 358, was also cited by Moonface.

hand, conducts his case with great skill and restraint and the verdict in favour of Jorrocks is largely attributable to his efforts.

Surtees appears to have taken a strong dislike to ' those legal nuisances called conveyancers whom it is to be hoped some contrivance will be found to extinguish.' One of them, Mr. Habendum, is only mentioned casually with the observation that ' it must be a marvellous title ' to which he could not take some exceptions.[29] The other, Mr. Twister, is dealt with at greater length.[30] Like Habendum he could find ' a loophole for an unwilling purchaser to creep out at in the very best of titles,' and though a ' voluminous conveyancer ' was but a ' concise conversationalist.' He is brought into the story in *Handley Cross* mainly for the purpose of serving as an introduction to his pupils and, above all, to his clerk.

> ' Having plenty to do himself, he took as many pupils as ever he could get, to help each other to do nothing. Each of them paid him 100 guineas a year, in return for which they had the run of a dingy, comfortless room, the use of some repulsive desks and liberty to copy 20 volumes of MS. precedents, that the great Mr. Twister had copied himself when a pupil with great Mr. Somebodyelse.'

Among the precedents referred to was ' Squelchback's Settlement—five hundred pages ! Great precedent ! produced ten issues an arbitration and a Chancery Suit.' Twister had four pupils, two being ' saps ' or men anxious to make their way at the Bar. The other two including the Hon. Mr. Lollington, who has already been mentioned, made no pretence of working. The pupil room was probably typical of the period both as regards its discomforts and the uneasy relations between the pupils. The only other Bar student portrayed by Surtees is Romeo Simpkins, ' a pert but simple looking, pink and white, yellow-haired youth, studying the law in Hare Court, in the Temple.' He comes into *Handley Cross* twice—once, when he breaks down in a speech which he attempted to make at the General Meeting of the Hunt, ' being anxious to train his voice for the Bar ' and again when he appears at the First Meet ' tip-tuping on a long-tailed dun with a crupper to the saddle surrounded by the four Miss Merrygoes, all ringlets and teeth, and the two Miss Millers, all forehead and cheeks.'

One of the most prominent figures in *Handley Cross* is Twister's clerk, Bill Bowker, a second-rate dandy who, like many of Surtees's characters, is a blend of vulgarity and roguery. He was a ' stout, square-built, ruddy-complexioned, yellow-haired, bustling, middle-aged man, with a great taste for flash clothes and jewellery.' The aforesaid ' flash clothes ' consisted of " a smart nut-brown coat with a velvet collar; a sky-blue satin stock, secured by numerous pins and brooches; a double-breasted red tartan waistcoat, well laid back; with brownish drab stockingette pantaloons and Hessian boots.' That admirable and faithful body of men, the Barristers' Clerks, have suffered much at the hands of novelists,

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[29] *Plain or Ringlets.*

[30] *Handley Cross.*

but it is difficult to believe that any practitioner could have employed so thorough-paced a rascal as Bowker, a sot and the associate of the worst and most macabre type of criminals. He showed little respect for Twister. A little hand bell goes tinkle, tinkle in the clerks' room:—

'There's the old file himself,' observed Bill bundling off, adding as he went, 'be back to you directly. . . . Confound these covenants for quiet enjoyment!' muttered he, returning and opening a pigeon-holed cupboard, labelled like the drawers against a chemist's shop wall with all sorts of titles; 'I get no quiet enjoyment for them, I know. One, two, three—there—three and one left,' returning a few sheets of manuscript to their hole, 'free from incumbrances. Wish I was,' thought Bill—'and for further assurance—one, two, three,' counted Bill, 'now let's see if he'll have the further assurance to ask for any more to-day.'[31]

As might be expected, the majority of Surtees's practitioners belong to his own branch of the profession and he gives us a picture, not to be found elsewhere, of the early Victorian country attorney. His selection is a very comprehensive one and ranges from the nobleman's confidential man of business down to the 'shyster' who picks up a precarious livelihood by trudging from one police court to another looking for business. Attornies and solicitors do not fare badly, on the whole, at his hands in spite of his cynical and sardonic attitude towards the legal profession in general. It is true that he remarks that 'the time spent in a lawyer's outer office waiting for an audience is about the most unprofitable part of a man's existence,'[32] but he also observes that 'there is no greater blessing to a country than a peace-making peace-loving lawyer, one who sacrifices his own interests rather than involve his neighbours in litigation.'[33]

Perhaps the best known of Surtees's attornies is Mr. Walter Fleeceall who figures in Leech's illustration of the 'Pomponius Ego Day' in *Handley Cross*. He was a 'tallish, middle-aged, very sinister looking, bald-headed gentleman, with a green patch over one eye and a roguish expression in the other.' Like many other country practitioners he held many offices, being an Attorney-at-Law and Solicitor in the High Court of Chancery, a Conveyancer, and Secretary of the Board of Guardians and Clerk of the Mount Zion turnpike road and Secretary to Jorrocks's Hunt, having offered to undertake the duties of the last mentioned post 'upon terms much lower than any other man could afford to take.' What these terms were appear from the Bill of Costs 'secured at the stitching with a delicate piece of blue silk' which he presented to the Hunt Committee in due course and was, perhaps, the main factor in putting the Hunt into liquidation. This Bill of Costs is an excellent piece of fooling. Here is one of the items:—

'Mrs. Margery Mumbleby having sent in a bill of £1 8*s*. 8*d*. for four hens, a duck, and a goose, stolen by the foxes, consulting sporting records to see whether foxes

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[31] One of Bowker's friends also makes a brief appearance—Mr. Shoestring, Serjeant Mustymug's clerk, a 'great luminary, a far greater man than his master.'

[32] *Plain or Ringlets.*

[33] *Ibid.* He also observes elsewhere that 'the lawyer is to the mind what the doctor is to the body.' (*Hillingdon Hall.*)

were in the habit of doing such things, engaged all day, and paid Mr. Hookem, the librarian, for searching through his Sporting works, £2 2*s.* 0*d.*'

The most attractive of Surtees's solicitors is Mr. Bullivant who figures in *Plain or Ringlets*. He 'united a little of the milk of human kindness with the stern leaven of the law,' and was a rough man but an honest one, who 'treated everything in a business-like way,' looking on matrimony, for instance, from 'a conveyancing point of view.' The extremes to which strict settlement was carried under the law as it stood at the period when Surtees wrote is illustrated by his reference to the fact that Bullivant had 'tied up some couples so tightly that they almost starved themselves in order that their descendants might live.' Different types are Mr. Docket, Solicitor to the Duke of Tergiversation, "one of the dubious order, a legal tool instead of an adviser,' and Mr. Saplington who did the private business of Goldspink, the banker, for nothing in consideration of what he got out of the bank for writing 'on or before letters and issuing *latitats* and missives of the forcing and imperative order.' The reference to '*latitats*' is to the commencement of legal proceedings in the common law Courts by Writ of *latitat* based on a fictitious trespass *vi et armis* which was issued when the sheriff made a return of '*non est inventus*' to a bill of Middlesex or some other county. The writ stated that the defendant *latitat et discurrit* in some adjoining county and ordered the sheriff to catch him.[34] This, together with other fictitious processes, was abolished by the Uniformity of Process Act, 1832.[35]

The most picturesque of Surtees's attornies is Mr. Carroty Kebbel,[36] 'a huge, red-haired Crimean-bearded peripatetic attorney.' Kebbel is a hedge-lawyer of the worst description who tramped along the roads 'from petty sessions to petty sessions, spending his intermediate time at the public houses, ferreting out and getting up cases. He was a roistering ruffian who contradicted everybody, denied everything and tried to get rid of what he couldn't answer with a horse laugh. He was in good practice, for he allowed the police a liberal percentage for bringing him prosecutions, while his bellowing bullying ensured him plenty of defences on his own account. He was retained by half the ragamuffins in the country.'

We now pass from the legal profession to the country magistrates of the period. Surtees's descriptions of Justices of the Peace and their activities must be regarded as of unusual interest because he was in a position to tell us a great deal about the administration of the law as it affected the rural population of England in the earlier part of the nineteenth century. In dealing with the 'great unpaid' he indulges freely in caricature, but he gives us a valuable picture of the operation of the Courts of summary jurisdiction at this period. A system which allowed a magistrate to dispose of petty offenders in the privacy of his

[34] Holdsworth, *H. of E. L.*, I, 220.
[35] 2 Will. IV, c. 39.
[36] *Ask Mamma.*

own sitting-room, must necessarily have led to abuses and this aspect of the matter is stressed not only by Surtees but also by Dickens in the farcical proceedings before Mr. Nupkins at Ipswich against Pickwick and his friends. There were obvious objections to this practice and it ultimately disappeared when the County Police came into existence.[37] Surtees introduces into his descriptions of Justices much that in Cinema English would be described as 'slapstick,' but it must not be thought that he in any way belittles the importance of the office of Justice of the Peace. When Jorrocks attains one of his chief ambitions by being placed on the Commission of the Peace by the Duke of Donkeyton his pride and delight is no less than it was when he became entitled to put the letters M.F.H. after his name. 'Binjimin,' he exclaims, 'greatness has come down upon me this morning in a shower—a regular clothes basketful of honour . . . I looks upon a beak as the greatest of men.'[38] And however extravagant and absurd the picture may be of Jorrocks sitting in his Justice Room at Hillingdon Hall, armed with a second-hand copy of *Burn's Justice* and a *Stone's Pocket Manual* and with Binjimin for a clerk, the fact remains that he discharges the duties of his office, for the most part, with great good sense and fairness. When a small boy is brought before him on a charge of stealing gooseberries from a garden, Jorrocks consults *Stone's Manual* and finds, under the heading of 'Stealing Vegetable Products' that the prescribed penalty is imprisonment for a term not exceeding six months. 'Well, Binjimin,' he observes, 'I think he is too young to send to quod; I'll deal summarily with the case. Take him to Batsay with my compliments and say: I'll thank her to take him into the laundry and give him a good bastinaderin'.'[38] This it must be remembered was at a time when children convicted of theft were usually punished with the utmost vigour of the law. In fact, most of Surtees's shafts were aimed at abuses or absurdities. The occasion of the 'swearing in' of Jorrocks as a magistrate at the Sellborough Sessions is utilised, for example, to illustrate the archaic and ridiculous nature of the oaths which a newly appointed Justice was then required to take.

Surtees had, in particular, a profound contempt for the ineffable pomposity of many of the Justices at this period. Among his pen pictures two stand out, namely, those of Mr. Tomkins J.P. and Mr. Muleygrubs J.P. Tomkins the Chairman of the Croydon Sessions, is described as 'the perfect prototype of a county magistrate with a bald powdered head covered by a low crowned brimmed hat terminating behind in queue, resting on the ample collar of a snuff-brown coat with a large bay window of a corporation with difficulty retained by the joint efforts of a buff waistcoat and the waistband of a pair of yellow breeches."[39] The worst that can be said, however, of Tomkins is that he is a pompous,

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[37] It has been said that the new police 'kicked the Justices upstairs.' Justices ceased to be concerned with the detection of crime and the apprehension of offenders.

[38] *Hillingdon Hall.* [39] Jorrocks's *Jaunts and Jollities* (Surrey Shooting).

self-important humbug. Muleygrubs, on the other hand, is one of the most disagreeable of the many unpleasant characters to be met with in Surtees's novels. He is pilloried in *Handley Cross* as a representative of the newly enriched middle class, some of whom were endeavouring at this time to thrust their way into county society and used their political influence to secure appointment to the Commission of the Peace. He had been a 'great stay-maker on Ludgate Hill,' inherited a fortune and then 'cut the shop' and bought Cockolorum Hall. Having been "a ramping Radical in the City' he was rewarded by a 'J.P'ship in the country' and set up to be a country gentleman. He is pictured as a mean-minded, stingy, bad-tempered little bore, and beneath contempt as a sportsman. ('Pa-ar shoots the fox,' as his equally unpleasant offspring, Darius, revealed to Jorrocks.) The J.P'ship was forced on visitors to Cockolorum Hall by a domestic stage setting which included 'a full length figure of Nemesis, the goddess of Justice with her balance in one hand and whip in the other,' and a collection of law books (*Burn's Justice*, the *Statutes at Large*, and *Archbold's Magistrate's Practice*) ostentatiously displayed. Muleygrubs never allows anyone to forget that he is a J.P. At the famous dinner party at Cockolorum Hall he seizes every opportunity of turning the conversation into the channel of the magnitude and importance of his office, and it must be admitted that he does this with some skill whilst the port is circulating. One of the guests, Professor Girdlestone, a geologist describes a spring which he had discovered in a certain rock formation in the neighbourhood, and Muleygrubs breaks into the conversation with the following exordium:—

'That's very strange! Old Tommy Roadnight came to me one morning for a summons against Willy Udal for that very thing. He would have it that Willy had bored the rock to draw the water from his well. Now I, as a justice of the peace of our sovereign lady the Queen—perhaps you are not in the Commission of the Peace are you, Mr. Jorrocks?'

'Not I,' replied Mr. Jorrocks, carelessly.

'Well, never mind, perhaps you may get in some day or other,' observed the consoling justice; 'but as I was saying, I, as a county magistrate, with the immense responsibility of the due administration of the laws, tempered always with mercy, without which legislation is intolerant and jurisprudence futile,—I, I say, did not feel justified in issuing my summons under my hand and seal for the attendance of the said William Udal, at the suit of the said Thomas Roadnight, without some better evidence than the conjecture of the said William, besides perhaps, you are not aware that the Trespass Act,[40] as it is termed, should rather be called the Wilful Damage Act, for the J.P. has to adjudicate more on the damage actually sustained by the trespass, than on the trespass itself, indeed without damage there would seem to be no trespass, therefore I felt unless the said Thomas Roadnight could prove that the said William Udal really and truly drew off the said water—'

'Con-found your water!' interrupted Mr. Jorrocks; 'give us the wine, and let's have a toast: wot say you to fox 'unting?'

'With all my heart,' replied Mr. Muleygrubs, looking very indignant, at the same time helping himself and passing the decanters. 'Upon my word,' resumed

[40] 7 & 8 Geo. 4, c. 30, s. 24. Proof of actual damage to the realty was essential. (See the judgment of A. L. Smith J. in *Gardner* v. *Mansbridge* (1887) 19 Q. B. D. at pp. 220, 221, for the history of the legislation on this matter.)

he, 'the man who administers justice fairly and impartially has no easy time of it, and were it not for the great regard I have for the Lord-Lieutenant and my unbounded loyalty to the Queen, I think I should cease acting altogether.'

'Do,' exclaimed Mr. Jorrocks eagerly, 'and take to 'unting instead—make you an honorary member of my 'unt—far finer sport than sittin' in a 'ot shop with your 'at on.'[41]

Muleygrubs is only suppressed, however, for the time being and later, a chance remark by Mr. Jorrocks as to the perils of hunting ('That's 'ow chaps brick their necks'), sets Muleygrubs on the go again:—

'True,' jerked in Muleygrubs.' Then comes the coroners inquest, the jury, the finding and the deodand,' observed the host. 'I regard the office of coroner as one of the bulwarks of the constitution. It was formerly held in great esteem, and none could hold it under the degree of knight, third of Edward the First, chapter ten, I think; and by the fourteenth of Edward the Third, if I recollect right, chapter eight, no coroner could be chosen unless he had land in fee sufficient in the same county, whereof he might answer to all manner of people.'

Muleygrubs's memory was not at fault. His references to the Statute of Westminster the First, 1275, and to the first statute of Edward III, c. 8, which replaced the *Statute de Militibus* of Edward II were correct.[42]

A curious sidelight is thrown on possible abuses of a Justice's powers under the old dispensation by Muleygrubs's methods of dealing with tramps who were so unfortunate as to fall into his hands. He informs Mr. Jorrocks that it was his habit to keep two heaps of stones and two hammers on the avenue to Cockolorum Hall and that whenever a beggar came to his door he received the option either of breaking stones or of being committed forthwith to hard labour in the House of Correction under the Vagrancy Act, 1824,[43] as a person able to work but refusing to do so. By means of this device he is able both to keep the avenue in repair and to have his walks weeded by the vagrants. 'But not for nothing?' remarks Jorrocks. 'Oh, yes,' is the reply; 'they never work long—generally sneak off at the end of an hour or two, forfeiting what they have done.' Muleygrubs adds: 'that working beggars and employing the new police about one's place occasionally are really the only pulls we Justices have.'

'Dress the police up as flunkeys, I s'pose,' observed Jorrocks.

'Just so,' replied Mr. Muleygrubs, 'or work them on the garden. It's by far the best way of disposing of the force,' continued Mr. Muleygrubs, 'for you see in a thinly populated district, where each man has a considerable range, you never know where to lay hands on a policeman, whereas, about here, they have only to send to his worship's to get one directly.'[44]

The new police referred to by Muleygrubs were the County Constabularies established under the provisions of the County Police Force

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41 See *ante*, p. 169.

42 See *Jervis on Coroners* (7th ed.), pp. 12 *et seq.*; also Holdsworth, *History of English Law*, I, 84, note (8), and the authorities cited there.

43 Jorrocks was a fervent admirer of this Act. 'Beats old Magna Charta into fits. In fact there is nothing like the fifth of George the Fourth for keeping things straight.' (*Hillingdon Hall.*)

44 *Handley Cross*,

Act, 1839.[45] *Handley Cross* was published in 1843 when the force had not been in existence for very long. Surtees, as a county magistrate, does not appear to have held it in much esteem. He gives us a portrait of Superintendent Shark of the Constabulary:—

'A hairy, seedy, well set up, military looking man, dressed in a shabby hook and eyed braided blue frock coat, which concealed as well the deficiency of linen as of waistcoat. His trousers were very broad, badly washed cords, shapped under a pair of boisterous badly soled boots. Altogether he was a cross between a serjeant and a circus master.' Shark was a rogue of the first water. If we are to regard him as typical of the country policeman of the period, corruption was rife in the force. 'Having no one to look after him he took his salary as a sort of retaining fee, looking upon "incidentals"—he called them—as the real emoluments of his office.' The 'incidentals' were made up partly by compiling a bogus bill of expenses in connection with a case and then endeavouring to bamboozle the prosecutor into paying it. The plea he put forward was that he had incurred out of pockets which would not be allowed on taxation.[46]

In conclusion, it would be an exaggeration to treat Surtees as having made any momentous contribution to the history of our law or to regard him as a law reformer. But he furnishes us with what Siegfried Sassoon has described as a 'Rowlandson-like picture'[47] of the conditions in which justice was administered in rural England in early Victorian days. This picture suffers from an over-emphasis of its more unpleasant details, but it was the work of one who, with all his shortcomings was a master of satirical comedy[48] and had a first-hand knowledge of law and practice. We may or may not agree with André Maurois that *Handley Cross* is the '*chef-d'œuvre du roman anglais*,'[49] but in any event Surtees's novels cannot be left out of account if an attempt is to be made to appreciate the atmosphere of the period or to form an estimate of the circumstances which gave an impulse to the movement for law reform in the first half of the nineteenth century. It is in these respects that Surtees's pen pictures of the law in action are of considerable value and interest to the lawyer as well as to the historian.

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[45] 2 & 3 Vict. c. 93; see Maitland, *Justice and Police*, Chap. X.
[46] See 7 Geo. IV, c. 64, s. 22.
[47] Introduction to the 1931 edition of *Hillingdon Hall*.
[48] Watson, *op. cit.*, 258.
[49] *Les Silences du Colonel Bramble*.

SOME SOURCES OF MODERN ENGLISH CRIMINAL LEGISLATION

A preliminary report on the Blue Books and Parliamentary Debates for the period 1760—1940

L. Radzinowicz

with a Note *by Professor P. H. Winfield, LL.D., Chairman of the Department of Criminal Science in the Faculty of Law of the University of Cambridge*

One of the salient points made in Dr. Radzinowicz's article is that the government publications collectively and inaccurately known as 'Blue books' have been almost totally ignored in our histories of Criminal Law. But his point is equally valid with respect to the history of many other branches of the law. One reason for this neglect is the inadequate bibliography of these historical sources. No doubt there has been some improvement in this respect during the last generation, but my own experience in using them has been that, except for the series styled 'British and Foreign State Papers' and the Calendars of some ancient state documents, their indexing is very imperfect. Yet the wealth of historical material in them is inexhaustible. What Maitland said of the unprinted sources of legal history might be applied to the publications that have been printed by government authority.

As to the topic on which Dr. Radzinowicz has concentrated his great ability, profound learning and untiring industry, the mere reading of his article vividly illustrates the enormous labour required to get the information in the 'Blue books' relating to criminal science reduced to an arrangement that will make it readily accessible to the historian in general and to his own projected history of Criminal Law in particular. I have always held, as I think Dr. Radzinowicz holds, that law reform is apt to be ill-considered unless the history of the law is taken into account. I should not say that reforms can never be sound unless the history of the law has been studied, but there is no doubt that, without such study, attempted amendments of the law may be one-sided or even positively mischievous. Readers of his article will find that he has given historical research in Criminal Law a new starting-point. He will remove from our literature on the topic the reproach of having at hand a gold mine without having made any real effort to get and to use its riches.

P. H. Winfield.

THE development of every branch of legal science depends on a full and systematic exploitation of its sources. Without this it is impossible to survey its historical development, to ascertain the range of problems which fall within its sphere, to review the way in which these problems have been solved, and finally, to trace its connection with other branches of legal knowledge. Nowhere is this statement truer than in England where, as a result of the uninterrupted continuity in its development, the past, the present, and the future of every important legal institution are intimately interconnected. It is particularly important to keep these considerations in mind when one undertakes a scientific examination and exposition of the system and achievements of English criminal legislation, which is to a very large extent based on the Common Law and has always been closely connected with the social, political and constitutional structure of the country.

But even a very cursory survey of the existing literature on this subject reveals the absence of such an exposition and, what is perhaps even more regrettable, the neglect of a very important source of information. The writers on the subject as a rule make use of the general mass of relatively modern juristic literature,[1] of the works of the ancient authorities such as Coke and Hale,[2] and of the decisions of the Courts.[3] They do not however take adequate notice of a source which, in our opinion, is so important that without its aid the preparation of an authoritative treatise on English criminal legislation, historically envisaged, is impossible. One result of this is that the present state of criminal legislation cannot be fully understood nor the course of its future evolution rightly conceived. A lack of such an historically comprehensive survey of the developments and experiments in the administration of criminal justice must also deeply affect the teaching of criminal law in the Universities and other centres of legal education in this country. This lack must also handicap students engaged in investigations of other institutions of English life, since it must often happen that they would like to incorporate certain information concerning the administration of criminal justice in the material of their own special investigations. And so it may occur that an important connection or interdependence between an institution of criminal justice and other institutions of social life cannot be explained or sometimes even ascertained.

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[1] In England there is no comprehensive catalogue of the general works relating to criminal science (books, pamphlets, articles) like that compiled in the United States by A. F. Kuhlman, 'A Guide to Material on Crime and Criminal Justice,' 1929; and Dorothy C. Alver, 'Bibliography of Crime and Criminal Justice,' 1934. A great amount of information on English material can, however, be found in the catalogues of the British Musem, of the London Library, and in that published by Sweet & Maxwell, 'Legal Bibliography,' 3 vols. Valuable references can be traced in some of the catalogues of the various libraries of the Inns of Court. A useful publication is that compiled by Sir John Cumming, 'A Contribution towards a Bibliography dealing with Crime and Cognate Subjects,' 3rd edition, London, 1935.

[2] See, on these works, Professor P. H. Winfield's book, 'The Chief Sources of English Legal History,' 1925, pp. 324—330, and the appropriate chapters in Professor W. S. Holdsworth's 'History of English Law,' particularly in Vols. V, VI.

[3] See again Winfield, *ibid.*, p. 145, and Holdsworth, *ibid.*, Vol. XII.

This source, hitherto not exploited in the study of criminal legislation is the material which is to be found in the published collection of State Papers commonly known by the name of '*Blue Books*.'[4]

It would be out of place in this memorandum to dwell upon the historical growth, the constitutional origin, the legal structure, and the factual arrangement of these documents, and we cannot do better than refer to those writers on constitutional and parliamentary matters who, in the course of their general exposition, have examined the Blue Books, as one of the institutions of state and parliamentary activity.[5] At this juncture, we consider it sufficient for our purpose to state what kind of State Papers we have in mind and how they can be grouped.

Hitherto we have used the term State Papers without explaining what we mean by it. We prefer this term to that of 'Parliamentary Papers.' In the first place it is wider and includes all the papers, even those which do not directly originate in either of the Houses of Parliament. Secondly, it conveys better our intention to make use of the whole material of this nature. We include in it the entire official material concerning criminal legislation and the administration of criminal justice in all its aspects and spheres.

Roughly speaking it comprises the following three main groups of documents:—

(*a*) The material embodied in the 'Commissions of Inquiry.' This is

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[4] For the origin of this curiously uninstructive name Mr. Hale Bellot remarks that the bibliography of the printed versions of papers which came into the possession of both Houses during this period is . . . 'confused in the first place by the popular use of the terms, "blue book" and "white paper," which are merely descriptive of a physical difference in Parliamentary Papers and have no further bibliographical significance. They mean no more than a paper which is fat and one which is thin. When a book is so thick that you must sew instead of stitching, then you must glue the back, and therefore you must have something to cover the glue and the stuff that is there; and it so happened that the colour chosen for that cover was blue.' See H. Hale Bellot, 'Parliamentary Printing, 1660—1837'; Bulletin of the Institute of Historical Research, Vol. XI, No. 32, Nov., 1933, p. 85.

[5] See, on this subject, Redlich, 'Recht und Technik des Englischen Parlamentarismus,' Leipzig, 1905, pp. 443—482 (not having at hand the English translation of Professor Redlich's authoritative book published in 1908, in three volumes, with an important introduction by Sir Courtenay Ilbert, we refer to the German original edition); Sir T. Erskine May, 'Parliamentary Practice' (13th ed., 1924); 'Manual of Procedure in the Public Business of the House of Commons,' prepared by the Clerk of the House, last edition; A. Todd, 'Parliamentary Government in England,' 1887, Vol. I; H. Hale Bellot, 'Parliamentary Printing, 1660—1837,' in the Bulletin of the Institute of Historical Research, Vol. XI, No. 32, p. 85; 'Bibliographical Aids to Research'; British Parliamentary Papers: Catalogues and Indexes; *ibid.*, Vol. XI, No. 31, June, 1933, p. 24; Guide to the Principal Parliamentary Papers relating to the Dominions, 1812—1911, Edinburgh, 1913, Preface containing a note prepared by the late Mr. Austin Smyth, Librarian to the House of Commons (on the origin of Parliamentary Papers); Report from the Select Committee on Publications of Printed Papers, 1837, 286, Vol. XIII; Report from the Select Committee on Publications, 1908, 358, Vol. X (Evidence of Sir Courtenay P. Ilbert, 2000—2050); Report of the Departmental Committee on the Procedure of Royal Commissions, 1910 [Cd. 5235], Vol. LVIII, p. 371; Hugh McDowall Clokie and J. William Robinson, 'Royal Commissions of Inquiry,' 1937; H. B. Gerland, 'Die Beziehungen zwischen dem Parlament und den Gerichten in England,' Leipzig, 1928; H. Fromageot, 'Etude sur les Pouvoirs des Commissions Politiques d'Enquête en Angleterre,' Bulletin de la Societé de Législation Comparée, Vol. XXII, 1892—1893, p. 165; W. Harrison Moore, 'Executive Commissions of Inquiry,' Columbia Law Review, Vol. XIII, 1913, p. 500.

in itself a generic heading as it covers material accumulated by the different kinds of Commissions of Inquiry, such as Royal Commissions, Departmental Committees, Inter-Departmental Committees, Select Committees, Joint Committees of both Houses, Tribunals of Inquiry.

(*b*) The material embodied in what is called ' Accounts and Papers.' This information, of which there is a very great mass, roughly speaking, covers the same range of subjects as that dealt with by the Commissions of Inquiry and is an indispensable complement of it. In most cases it differs fundamentally from the first type of information, but sometimes the line between certain papers belonging to the first group and others belonging to the group of accounts and papers cannot be distinctly drawn.[6]

(*c*) Finally, we include the ' Annual Reports ' which are published by different State departments concerned with the administration or supervision of certain sections of the machinery of criminal justice. Within this group fall, among others, the reports of the Prison Commissioners, of the Children's Branch, the annual volumes of Criminal Statistics, and the reports issued by the Public Prosecutor's Office.

These State Papers, however, immense though their volume is, do not exhaust all that the records of English legislative activity offer to the student of Criminal Science. All authorities on constitutional law are unanimous in pointing out that these papers are a product of the Parliamentary system. It is in the House of Commons, or the House of Lords, that we can find the explanation of the circumstances which have led to the setting up of a Commission of Inquiry or to the demand for an Account or Paper. It is there that the necessity or the superfluity of such a decision is discussed. It is there, when an agreement is reached on that point, that the precise extent, as expressed by the terms of reference, is generally defined and circumscribed. It is there that once the Commission has completed its labours or the Return asked for has been laid upon the table of the House, that the substance of the information gathered and expressed in the recommendations of the report is again brought before the House and again gives rise to an exchange of opinions upon the subject. And it is there that, generally upon the findings of the State Paper, steps are taken to bring in new laws with the purpose either of eliminating the evil brought to light by the paper in question or of stimulating further improvement in some state activity or machinery.

Of course this parliamentary activity does not arise spontaneously but is in its turn the product of powerful and diverse forces which operate within society and which are set in motion by the conflict of interests and aspirations that eventually force themselves upon the attention of one or other of the two Houses. But we are not concerned here with the

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[6] ' Public Bills and Reports of Committees '—writes H. B. Lees-Smith—' form two clearly marked and definite groups; but there is no obvious dividing line between the Reports of Commissioners and Accounts and Papers.' H. B. Lees-Smith, ' A Guide to Parliamentary and Official Papers,' 1924, p. 9.

explanation of this complex process of law-making. What we desire is to make it clear that a real understanding of the collection of State Papers and its proper scientific utilization is impossible if their study is divorced from the study of that other source which is embodied in *Parliamentary Debates* and is a record of the work accomplished by both Houses in criminal legislation, in their control of the executive, and in their supervision of the administration of justice.[7]

The connection between these two sources is so close that for the purpose of a scientific investigation into the English system of criminal legislation it is essential to amalgamate the two. This means that the whole work of both Houses relating to criminal matters must be singled out from the Parliamentary Debates and arranged chronologically.

Our total sources then, consist of two masses of information: one derived from the State Papers, and divided into three sections (Commissions of Inquiry, Accounts and Papers, Annual Reports),[8] the other from the Parliamentary Debates.[9]

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[7] Naturally this material is strongly influenced by the particular point of view of each of the great political parties fighting for power, and, therefore, when referring to it, we must always bear in mind the observations made by Maitland in connection with constitutional history. . . . ' Political struggles '—he says—' are important, but chiefly because they alter the law. Constitutional history should, to my mind, be a history, not of parties, but of institutions, not of struggles, but of results; the struggles are evanescent, the results are permanent.' F. W. Maitland, ' The Constitutional History of England,' Cambridge University Press, 1908, p. 537.

[8] This material is to be found (together with the Bills and Standing Committee's Reports) in what is called the bound set of Parliamentary Papers. This collection comprises, since 1800, about 9,000 volumes. We have made use of the following series of catalogues: Catalogues of Parliamentary Reports, etc., 1696—1834 (1834, 626) (this volume contains also the most important reports published since 1696 and up to 1800 either in the Journals of the House of Commons or in the Series of Reports of the House of Commons, called the First Series of Reports); General Index to the Bills, Reports, Accounts, etc., 1801—1832 (1833, 737); General Index to Bills, Reports, Accounts, etc., 1832—1844 (1845, 396); General Index to the Bills, Reports, Accounts, etc., 1845—1850 (1850, 698); List of the Bills, Reports, etc., 1851, 629 (1851, Vol. LX); General Alphabetical Index to the Bills, Reports, etc., 1852—1899 (1909); General Alphabetical Index to the Bills, Reports, etc., 1900—1909 (1912, 351); General Alphabetical Index to the Bills, Reports, etc., 1910—1919 (1927, 169); General Alphabetical Index to the Bills, Reports, etc., 1920—1928—29 (1931, 8); List of the Bills, Reports, etc., for 1929—30 (1931, 181); for 1931—32 (1933, 119); for 1932—33 (1934, 171); for 1933—34 (1935, 134); for 1934—35 (1936, 136); for 1935—36 (1937, 167); for 1936—37 (1938, 166); for 1937—38 (1939, 180); for 1938—39 (1940, 198).

A collection of certain important Commissions of Inquiry on various matters has been published by P. S. King & Son, and comprises three volumes (1801 to 1900; 1901 to 1910; 1911 to 1920). A selective compilation referring only to Royal Commission Reports in the period 1860 to 1935 has been published under the auspices of the Harvard University Committee on Research in the Social Sciences under the title, A Finding-List of British Royal Commission Reports, 1860 to 1935, compiled by Mr. B. L. Gabiné, Harvard University Press, Cambridge, Mass., 1935. A catalogue of the most important Parliamentary Papers relating to the Dominions in the period 1812—1911 has been published by Margaret J. Adem, John Ewing, James Munro, partially subsidised by the Bert Fund at the disposal of Oxford University. See Guide to the Principal Parliamentary Papers relating to the Dominions, 1812—1911, Edinburgh, 1913.

However, the only scientific compilation of Blue Books, dealing with a particular subject, known to us is that by Harold Temperley and Lilian M. Penson, published at the Cambridge University Press, and entitled, A Century of Diplomatic Blue Books, 1814—1914. Lists edited, with historical introductions.

[9] ' As the eye follows the volumes of Parliamentary Debates on the shelves of the House of Commons Library '—writes Mr. H. K. Lees-Smith in his ' Guide to Parliamentary and Official Papers ' (Oxford University Press, 1924, p. 14)—' eight centuries of English

Dr. A. D. Lindsay, the Master of Balliol, said in his preface to Professor Wilhelm Dibellius's book on England: ' . . . The things about us that strike other people—and this is perhaps even truer of nations than of individuals—are mostly the things we ourselves so much take for granted that we are ourselves hardly conscious of them.'[10] Professor Elie Halévy, whose ' History of the English People ' and whose ' La Formation du Radicalisme Philosophique en Angleterre,' rightly enjoy such a high reputation amongst English scholars, makes a similar observation. After having excused himself for his ' boldness ' as a Frenchman in undertaking a history of England Professor Halévy stresses the advantage which a foreign student possesses over a native, an advantage which he describes as follows: ' Very different is the attitude of the observer from abroad. A great number of characteristics which, being familiar to the natives from birth, have come to form part of their intellectual and moral nature, are for him a matter of astonishment—whether of admiration or disapproval is indifferent—and demand from him an explanation. Indeed, of all the nations of Europe, it is perhaps the English whose institutions must, in many respects, be regarded as being beyond the institutions of other people, paradoxical, " unique ".'[11]

This reasoning seems to us to contain so much of historical wisdom, that we think it will be useful for our purpose to quote the opinions of certain foreign scholars of different origin and of different intellectual pursuits on that aspect of English State activity which produces the State Papers and to stress how greatly they value that material as a general source of information and as a background for future legislation. In this connection the writings and opinions of von Mohl,[12] Cohn,[13]

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history unfold themselves before one, for the record begins in the year 1066 and closes with the previous day's parliamentary business. The volumes up to 1803 are entitled " The Parliamentary History," and are not an actual report of debates, but a collection of records of Parliamentary proceedings made by Mr. Hansard in 1806 from original sources. They are still useful for reference, although subsequent historical research has done much to amplify and supplement them.' The Parliamentary Debates proper begin in 1803, and are divided into five series. Up to 1908 the debates of both Houses are published together, but since 1909 a separate series of volumes has been published for each House. The Parliamentary History comprises 36 volumes. First Series of Parliamentary Debates (1803—1820), 41 volumes; Second Series (1820—1830), 25 volumes; Third Series (1830—1891), 350 volumes; Fourth Series (1899—1908), 77 volumes; Fifth Series (1909 up to March, 1942), 500 volumes.

[10] English translation from the revised fifth German edition, London, 1930, p. 7.

[11] ' A History of the English People,' 1924, Vol. I, Preface, pp. x—xi. On this work Professor J. H. Clapham expresses the following opinion: ' . . . A History which I regret that an Englishman has not written, because our social and political postures have never been so well drawn against an adequate economic background ': ' An Economic History of Modern Britain,' Cambridge University Press, 1926, Vol. I, p. ix.

[12] As far back as 1856 Robert von Mohl spoke about the ' Unermesslichkeit ' of the material of Parliamentary Papers and stressed their immense value. Professor J. Redlich, who in his treatise on the ' Recht und Technik des Englischen Parlamentarismus ' (Leipzig, 1905) quotes this opinion, entirely agrees with it, and himself defines the collection of State Papers relating to Royal Commissions of Inquiry as ' . . . gewaltiges, unschätzbares Material zur Erforschung der ökonomischen, rechtlichen, und sozialen Entwicklung Englands in 19 Jahrhundert . . .' (*ibid.*, p. 297).

[13] Gustav Cohn, Parlamentarische Untersuchungen in England; Jahrbücher für Nationalökonomie und Statistik, Band XXV, 1875; Schriften des Vereins für Sozialpolitik, Band XIII, 1877. Reproduced in his book, ' Volkswirtchaftliche Aufsätze,' Stuttgart, 1882, pp. 1—50.

Comte de Franqueville,[14] Gerland,[15] H. F. Gosnell,[16] A. H. Cole,[17] Clokie and Robinson,[18] provide most stimulating and encouraging reading. They all, when examining the origin and the practical weight of the collection of State Papers, consider it a most fundamental institution of English public life. They are unanimous in regarding this material as an invaluable and indispensable source of investigation into the economic, social, political, and legal development of England. Those amongst them, in whose country this type of inquiry is unknown, urge even now, the establishment of such investigations.[19] In England too, a serious student would to-day hardly venture to examine an important institution of this country without consulting the appropriate information collected in the great series of State Papers that deal with the institution in question.[20]

It is not surprising that in our investigations we reach a similar conclusion. Our study of the English collection of State Papers on criminal matters enables us to make the five following observations:—

(*a*) This material, both as to quantity and quality, is not only equal but in many cases superior to that comprised in any other collection of State Papers which deal with other aspects of State activity.

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[14] See the interesting remarks made by Comte De Franqueville in his book on 'Le Gouvernement et le Parlement Britainques,' 1887, Vol. III, pp. 372—378.

[15] H. B. Gerland, 'Die Beziehungen zwischen dem Parlament und den Gerichten in England, Eine rechtsvergleichende Studie,' Berlin und Leipzig, 1928, p. 94 *ff.*

[16] H. F. Gosnell, 'British Royal Commissions of Inquiry,' Political Science Quarterly, Vol. XLIX, 1934, pp. 84—118.

[17] A. H. Cole's Preface to a 'Finding-List of British Royal Commissions Reports,' Cambridge, Mass., 1935. Publication by the Harvard University Committee on Research in the Social Sciences.

[18] Hugh McDowall Clokie and J. William Robinson, 'Royal Commissions of Inquiry,' Stanford University Press, 1937 (a book of 242 pages devoted entirely to this subject).

[19] The collection of State Papers on economic matters has for a long time been thoroughly exploited by foreign scholars interested in English Economic History. For instance, Karl Marx, in the very first edition of his work 'Das Kapital' (1867), made an extensive analysis of that material from 1848 onwards. So did Adolf Held in his pioneer work (unfortunately not completed) on English economic and social history. In this work, published posthumously by G. F. Knapp, 'Zwei Bücher zur sozialen Geschichte Englands,' Professor Held said: 'In seinen Parlamentpapieren besitzt England ein unvergleichliches Quellenmaterial . . .' See *ibid.* 'Zweites Buch. Entwicklung der Grossindustrie,' p. 391. A very important use of that information has also been made by the French scholar, Dr. P. Mantoux, in his book on 'The Industrial Revolution in the Eighteenth Century,' published for the first time in French about thirty-five years ago and afterwards translated into English.

[20] Mr. and Mrs. Sidney Webb in their book on 'Methods of Social Study,' 1932 (Chapter VII, 'Royal Commissions and Committees of Enquiry as sources for the investigator,' pp. 142—157), are not sparing in their critical observations on the defects of certain of these inquiries. But their remarks aim only at proving the point, with which we fully agree, that certain official investigations should not exclusively be based on one source of information, especially on that of oral evidence. In their concluding passage, however, the authors express the following favourable opinion: 'Taken as a whole the massive array of British blue-books stands pre-eminent as a source of information about contemporary social conditions and contemporary public opinion, whilst some of the final reports are, in their constructive relation to legislative and executive activities, great state papers.' *Ibid.*, p. 156.

An interesting book, worth perusing even to-day, was published in 1849 by J. Toulmin Smith, 'Government by Commissions Illegal and Pernicious,' etc. This book is a violent attack on the official investigations carried out by Commissions, as constituting a direct threat to the constitutional structure of the State and the individual rights of the subject.

(*b*) When compared with other sources of criminal science it stands out distinctly in originality, thoroughness and practical importance. There is hardly one topic of criminal legislation with which these Papers do not deal. These are some of the problems studied: criminal law, approached not only from the point of view of the definition of the various offences, but also the possibilities for its digestion and codification; criminal procedure and law of evidence; the system of public prosecution; the organization and the working of the various types of Courts; the system of police and its administrative powers; the different kinds of punishments, from the heaviest to the lightest, such as capital punishment, transportation, corporal punishment, fine, penal servitude, and the prison system in its various aspects; the probation system; reformatory schools; institutions for inebriates; particularities of certain important categories of offenders and the best methods of the treatment of young offenders, vagrants, mentally deficient, and insane persons, recidivists; the state of crime and statistical investigations into the working of the whole machinery of criminal justice; the creation of new crimes; the legal position of the accused person and the best means to be adopted to assure his defence throughout all the stages of judicial proceedings; certain flagrant abuses committed by the different organs of criminal administration; crime in connection with the poor law system, public health legislation, licensing enactments, bankruptcy procedure; imprisonment for debt; labour legislation and the law relating to combinations. Each of these subjects has been treated by these State Papers or by a whole series of them, spread over more than two centuries, during which period the whole administration of criminal justice in this country has undergone a fundamental transformation. Immensely rich information can be extracted from the evidence accumulated by these documents, from the special inquiries often undertaken by order of the committee, from the appendices, frequently containing important memoranda prepared by the state department concerned in the investigation, from the statistical and factual data accumulated by the mass of accounts and papers and from the description of difficulties encountered when administering criminal justice, recorded by the various departments in their annual reports. On the other hand, the principal body of the report with its terms of reference and recommendations explains the background and the essentials of future legislative activity.[21]

[21] What increases still more the value of the information collected is the fact that very often Commissions of Inquiry are composed of members who are known to hold entirely opposite views on the subject they are called upon to investigate. In a debate on a resolution presented by Mr. W. Ewart in reference to the formation of Select Committees, Sir George Lewis made the following interesting observation: 'If therefore Public Committees consisted wholly of impartial men their investigations would be most unsatisfactory. Strong partisans on each side were knowingly and advisedly chosen, in order that truth might be elicited from the conflict of opposite, and it might be interested, opinions. Indeed, in forming such committees the avowed object of them was to have different interests represented, and complaints were sometimes made that a Committee was unfairly constituted precisely because conflicting interests were not duly represented in it.' See Parliamentary Debates, Third Series, Vol. CLXII, 1861, Col. 1012.

(*c*) Every one who has studied State Papers, stresses not only their value as a source of information, but also their great practical importance as directly influencing the legislative activity of the State. That distinguished American student of English political institutions, the late Professor A. Lawrence Lowell, President of Harvard University, expressed his opinion on that subject as follows: 'The fact that men with all shades of opinions sit upon these committees, and have an opportunity to examine the witnesses, lifts their reports, and still more the evidence they collect, above the plane of mere party documents, and gives them a far greater permanent value. Many committees are not directly concerned with legislation, that is, with a bill actually pending, but only with inquiry into some grievance, some alleged defect in the law or in administration, yet their reports often lay the foundation for future statutes; and, indeed, a large part of the legislative or administrative reforms carried out by one or both of the great parties of the state, have been based upon the reports of select committees or royal commissions.'[22] Our study of the collection of State Papers on criminal matters fully confirms this judgment. English criminal legislation in the whole course of its development has been most powerfully influenced by the findings and the recommendations contained in that material. A very considerable part of the penal enactments were *de facto* nothing more than a statutory expression of the essential recommendations formulated by certain important commissions of inquiry. All the main provisions of the Criminal Justice Bill, a measure laid before Parliament in 1938, which constitutes the most important penal measure of the period between the two wars, had been previously recommended by various Reports issued in the same period, which rank very highly indeed in that collection of State Papers.

The same phenomenon can be observed in relation to very many other penal bills or statutes brought forward or adopted in the last 150 years.[23]

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[22] 'The Government of England,' 1912, Vol. I, p. 268. This opinion is fully confirmed by English students. Sir Courtenay Ilbert writes in his book, 'The Mechanics of Law Making,' New York, 1914, p. 70: 'Most of the important legislation in England is preceded by an official inquiry, and is based, more or less, on the reports and the recommendations of some commission or committee.'

Contemporary constitutional writers fully agree with that point of view. 'The British Constitution has therefore developed a technique of public inquiry. . . . The fact finding function remains important, but more important still is the recommendation of remedies. Few years pass without at least half-a-dozen reports from Commissions and Committees, and most of these are in due course translated into legislation': W. Ivor Jennings, 'Parliament,' Cambridge University Press, 1939, pp. 201—202.

[23] Sir Edward Troup, Permanent Under-Secretary of State in the Home Office, 1908—1922, makes the following observations: '. . . Nearly every important measure of reform has been preceded by an inquiry by a Royal Commission or a Parliamentary or a departmental committee, sometimes by several such inquiries': 'The Home Office,' second edition, 1926, p. 38. Naturally, even if immediate legislative action is not taken upon the recommendations of a Commission of Inquiry, this does not mean that the Commission's work has been useless. The Government may abstain from action for various reasons. For instance, it may come to the conclusion that public opinion is not yet ripe for such a measure; it may decide that the recommendations of the Commission does not provide an adequate remedy. In this connection Lord Beaconsfield said in a Debate in the House of Lords: 'My Lords, I do not think that there is anyone who more values the labours of Parliamentary Committees than myself. They obtain for the country an

The study of this material in connection with that relating to Parliamentary Debates, is indispensable to a clear understanding of the various legal enactments which have been put into force and which regulate the administration of criminal justice. The reason why a bill was introduced at a given moment, and not earlier or later; why it was rejected, very often only in order to reappear subsequently; why a proposed legal enactment, when passing through the Parliamentary stages of law making, underwent certain changes, sometimes of such a far-reaching nature that the bill adopted hardly resembled that brought in—all these and many other equally important phenomena become clear when we obtain a thorough knowledge of this historical material.

(*d*) Finally this material acquires an additional value when compared with that available in other countries. In scarcely any country in the world does such a collection of information on criminal law exist and in the very few countries in which it is known, it never grew to such proportions, nor did it ever possess the advantage of such a continuity in its development.

In the field of criminal justice England occupies a most prominent place and may be rightly proud of the basic principles and practical achievements of its penal system. These should be made known to the fullest possible extent in other countries and should be taken into consideration by them when attempting to improve their penal administration. A detailed and comprehensive exposition of English criminal legislation based on the material in question would show them clearly what England has already achieved in this field. This is most urgently needed in view of the fact that the English penal administration is still so little known abroad.[24]

Finally, as has been already stated at the beginning of this memorandum, such an exposition is required for a fuller study of criminal law and procedure in the academic and professional centres of this country.

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extraordinary mass of valuable information which probably would not otherwise be at hand, or available; and formed as they necessarily are of chosen men from the two most important bodies of the State, their Reports are pregnant with prudent and sagacious suggestions for the improvement of the administration of affairs. . . . But, my Lords, I never for a moment have maintained, nor do I know any personal or written authority that has maintained, that the Resolutions of a Committee of the House of Commons were infallible. . . .' See Parliamentary Debates, Third Series, Vol. CCXXXV, 1877, Col. 1478.

It must also be borne in mind that even if a Government fully and entirely adopts the recommendations of a Parliamentary Committee this does not mean that it ceases to be responsible to both Houses for such action and all its consequences. It has been emphasised in Parliament that a too frequent use of commissions of inquiry may have an undesirable effect upon the political and executive initiative of the Government and upon its prestige, or even upon the independence of the Houses themselves. See on this point Disraeli's observations in Parliamentary Debates, Third Series, Vol. CLXI, 1861, Col. 1267, and Col. 1867—1868, and those made by Cobden, *ibid.*, Vol. CLXXVI, 1864, Col. 1908.

[24] Sir Evelyn Ruggles-Brise K.C.B. who for so many years was the Chairman of the Prison Commission for England and Wales and British delegate to the International Penal Congresses, said: 'I had been greatly impressed with the singular ignorance that existed, both on the Continent and in the United States, of the character of British penal methods. . . . He [an Englishman who goes abroad] will find that where the English system is not known or is misunderstood, it is but little appreciated.' 'The English Prison System,' 1921, pp. II—III.

Although there can be no doubt whatever of the immense and unique value of that material its scientific arrangement and comprehensive study have not yet been attempted. Two illustrations will suffice to show how very little it has been exploited in any major scientific exposition of criminal law and legislation in this country. There are only three occasions on which Sir James Fitzjames Stephen refers to the Blue Books in his three volumes on the History of English Criminal Law. Thus when he describes the establishment of the Metropolitan Police Force, but his reference simply mentions in a footnote the series of the Police Reports of 1816, 1817, 1818, 1822, and 1828, describing the inadequate police organisation in existence before the passing of the 1829 Act. He then adds: 'The evidence given before them fills several blue books, and is curious and instructive.'[25]

Again, there is nothing in the published works of the late Professor Kenny to show that he made any extensive researches into the material contained in the Blue Books. Even in the chapters of his 'Outlines of Criminal Law' which deal with the purpose of punishment, the penal system, and the classification of offenders, Professor Kenny leaves out that material, and only when discussing the state of crime gives in one or two footnotes some fragmentary figures taken from the annual volumes of Criminal Statistics or from the Annual Reports of Prison Commissioners.[26]

Two exceptions are, however, worth mentioning. In 1887 Dr. P. F. Aschrott, a Berlin judge who for many years worked with the famous German criminal lawyer, Professor F. v. Liszt, for the development of criminal science and penal reform in his own country, came over to England to carry out an investigation into the English penal system with special reference to the prison system. As a result of this he published a book on the subject and drew largely upon the Blue Books for his references. Although his publication was restricted mainly to the prison system, even within these limits the use that he made of the official publications is far from satisfactory. The fact, however, remains that Judge Aschrott clearly realised the immense value of the material embodied in the English collection of State Papers upon this subject. The following observation of his is worth reproducing: 'Hierfür habe ich in sehr umfassendem Masse auf das *Urmaterial* (our italics), die englischen Blaubücher, zurückgehen müssen. In den Jahresberichten der Gefängnisbehörden und in den Berichten der zahlreichen im Laufe dieses Jahrhunderts niedergesetzten Kommissionen zur Untersuchung der Gefängniszustände ist ein *ungeheures Material angesammelt* (our italics)

[25] Vol. I, p. 196. See also pp. 480 and 482, where there are two other brief references.

[26] See Kenny, 'Outlines of Criminal Law,' Chapters II, XXXIII, XXXIV. The only occasion on which Professor Kenny refers to a report on Criminal Law is when he quotes an opinion taken out of the 'Explanatory Memorandum' prefixed to the Drafts of a Criminal Code and Code of Criminal Procedure for the Island of Jamaica: *ibid.*, pp. 33 and 239.

L. O. Pike, in his 'History of Crime in England,' 1873—76, also makes practically no use of the Blue Books.

welches bis jetzt auch in England noch keine wissenschaftliche Verwertung, gefunden hat . . .'[27] A much more extensive and thorough use of the collection of State Papers relating to the prison system was made nearly thirty years later by Lord and Lady Passfield (Mr. and Mrs. Sidney Webb) in one of the volumes of their work on Local Government, 'English Prisons under Local Government (1922).' They, too, emphasize the importance of the official publications as an indispensable source of any treatment of the subject of penal administration.[28]

So far there has been published no full exposition of the development both of the criminal legislation and of the administration of criminal justice in England. As stated above, this lack is most probably to be explained by the fact that the material gathered in the total collection of State Papers has been neglected, if not overlooked.[29] But in this connection, another gap no less important, should be noticed. The material of State Papers and of Parliamentary Debates having a direct bearing on the development of this branch of law is of such magnitude and stretches over such a long period that its adequate utilization is only possible when this truly colossal mass is systematically arranged in its historical development, according to a rational classification adopted and followed throughout the entire scheme, and this has not yet been attempted. It would seem advisable that such a task should be carried out on the following lines:—

(*a*) First of all the material has to be traced back as far as possible. The available catalogues of Parliamentary Papers enable this to be done for a period roughly of 250 years. The utilization of this mass of information over such a period will make it possible to build upon scientific principles a survey of the development of the modern system of English criminal legislation.

(*b*) Secondly, the material chosen must comprise all the kinds of State

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[27] 'Strafensystem und Gefängniswesen in England,' Berlin, 1887, p. VII. See also Dr. Aschrott's later study in which he brings to the notice of the German students the development which took place in the English Penal System in the ten years following the publication of his first publication: 'Strafen und Gefängniswesen in England während des letzten Jahrhunderts. Eine Ergänzung zu dem in Jahre 1887, erschienen Buche "Strafensystem und Gefängniswesen in England,"' Berlin, 1896.

[28] 'English Prisons under Local Government,' 1922, pp. 1—2, footnote [2], where they state that the '. . . extensive Parliamentary inquiries into Penitentiary Houses, Police and Prisons, between 1811 and 1835 afford . . . "the most useful material prior to 1835" (together with the works of John Howard, James Neild, and Sir Thomas Fowell Buxton) as do . . . the voluminous Parliamentary Papers and Home Office Reports . . . after that date.' And *ibid.*, p. 111, where the authors refer to 'the voluminous five successive reports of the House of Lords Committee on the State of Gaols and Houses of Correction, 1835, with their elaborate statistical returns and lengthy descriptions,' and call this inquiry 'the most comprehensive and the most searching survey of English and Welsh Prisons yet produced.' The Duke of Richmond was the Chairman of that famous Committee.

[29] In his note published in the Law Quarterly Review on the occasion of the setting up by the Faculty Board of Law in the University of Cambridge of a 'Committee to consider the promotion of Research and Teaching in Criminal Science' (which has since led to establishment by the University of a 'Department of Criminal Science'), the Editor, Professor A. L. Goodhart, wrote: 'It has frequently been a source of surprise to foreign students that no English University has a Professorship of Criminal Law, and that there is no central institution which is organized to deal with the valuable material to be found in the various reports and statistics which are published on this subject': L. Q. R., Vol. LVI, October, 1940, p. 462.

Papers on criminal matters in the tripartite classification above mentioned, together with the Parliamentary Debates. The investigations in this field must be extensive in order to produce a record which will enable students of widely different needs to profit by this great source of information.

(*c*) Thirdly, no documents can safely be omitted from any of the sections of the classification. As the editors of the catalogue of Parliamentary Papers for the period 1696—1834 rightly say in their preface to that important compilation: 'Considered separately, perhaps some of these early Reports may be deemed of too little importance, or too long out of date, to need mention in the catalogue; but when their connection with subsequent Reports on similar subjects is observed, their relative importance may make them interesting . . .'[30]

(*d*) Fourthly, special attention must be paid to the development of criminal law which has taken place since the second half of the nineteenth century. It was in this period that under the strong influence of changes which occurred in the economic, social and political structure of English society, the view was gaining ground that the liberal doctrine which limited the role of the State to that of a simple guarantor of individual rights could no longer be considered as sufficient. This evolution was followed by a progressive and systematic interference on the part of the State in the different spheres of economic and social life and by a continually increasing mass of legislation. Social responsibility and social duties have thus been enforced upon the individual. As might have been easily foreseen the progress of social legislation considerably extended the scope of criminal law since it was considered necessary to make an appeal to penal repression when the individual tried to escape from his new social duties. New criminal legislation—connected with the public health, municipal administration, educational policy, and industrial protection—was steadily emerging and growing in order to deal with the new type of crimes sometimes called administrative criminality, as opposed to '*natural*' criminality.[31] It is therefore clear that all State Papers which have a direct bearing on this new ramification of criminal law must be included in the mass of papers dealing with criminal matters in the traditional sense of this word.

(*e*) Finally, it is not sufficient to present the whole material in its chronological order. It is necessary to regroup it under a classification which, while relating to the special nature of each separate document, will make it easier to analyse the whole so as to elicit not only the main principles of English criminal policy but also to pursue the detailed investigation of any particular topic. Accordingly we have endeavoured, wherever possible, to divide each of the three principal groups of official State Papers into separate headings. These headings, 130 in number, are the same for each group. The material relating to the Parliamentary

[30] Catalogue of Parliamentary Papers, etc., 1696—1834, 1834, 626; Preface, p. III.
[31] See on these modern trends in crime the interesting observations made by A. C. Hall: 'Crime in its relations to Social Progress,' New York, 1901, p. 249.

Debates although kept separate from that relating to State Papers should be grouped as far as possible under the same headings.

The completion of this task must of course proceed by stages. The first is the arrangement of the material comprising State Papers and Parliamentary Debates in the form of a source for scientific investigation. We have already suggested a way of grouping this material and it would not be in accordance with the scope of this memorandum to dwell upon the subject at greater length.

One or two additional remarks should, however, be made as regards the second stage of this work, *i.e.*, the exploitation of the whole material, when finally arranged.

Two modes of approach are possible. The first would consist in the singling out of all the problems of criminal legislation with which this material deals, and the examining of each of them separately throughout the whole period. The second mode would consist in the singling out within the period under consideration of certain main sub-periods, and the examination of all the criminal problems as they appear in that sub-period.

We have come to the conclusion that the second method of analysis presents some very marked advantages over the first one. There is a close connection between the various problems of criminal legislation, and a study of each one of them separately would very often either efface or distort this connection. Secondly, and this is perhaps even more important—the material is historical, and the use of a mechanical method of isolation in its presentation is not to be recommended. It is far from being an accident that in a certain given period of its development society is confronted with certain specific problems and that it solves them in a certain way or disregards them altogether.

When undertaking the historical exposition of an institution which is so closely interconnected with the whole structure of society as is the institution of criminal justice, it is of paramount importance to ascertain first whether in its development one can discover certain fundamental periods, and secondly, whether these periods agree more or less with the broad phases in the development of society as a whole. It is well known that such broad phases in the social and legal development of English society have been noted and pointed out by Dicey.[32] The examination of our material has led us to the conclusion, that, roughly speaking, English criminal legislation has passed through similar stages. We can distinguish three main periods. The first period would cover the years 1760—1830; the second, 1830—1895; and the third, 1895 to the present day.

Although the survey will have to be based on the State Papers, Parliamentary Debates and legislative enactments, other sources of criminal science and certain important works dealing with political and social

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[32] 'Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century,' 1930, pp. 62—69. See also Sir Roland K. Wilson, 'The History of Modern English Law,' 1875; Sir Leslie Stephen, 'The English Utilitarians,' London, 1900,

development have also to be taken into account. While, however, exhaustive use should be made of the first source, an appropriate selection from the other material would be sufficient for our purpose.

It seems to us that such an investigation, if successful, would produce a comprehensive history of English Criminal Legislation. Volume I would comprise the sources in which the whole material would be grouped on the lines explained above, so as to present the foundation of the survey and make it possible for other students to carry out further investigations. Each of the three successive volumes would be devoted to the exposition of criminal legislation in each of the periods above mentioned (Vol. II, 1750—1830; Vol. III, 1830—1895; Vol. IV, 1895 up to the present time).

Finally, we would like to add a few words on what we have been able to do until now in the prosecution of this research.

The first volume, *Sources of English Criminal Legislation*, 1760—1940, has been completed. The whole material covering the Commissions of Inquiry, Accounts and Papers, Annual Reports, and Parliamentary Debates has been arranged on the lines explained in this memorandum. It seems to us that the following few figures will given an idea of the volume of that material and also if we may be allowed to mention it—of the task which confronted us, a task which was made more arduous by the fact that we were obliged to regroup a very great portion of the material many times in order to obtain the final classification. The material comprises about 1,250 reports of the different Commissions of Inquiry, about 3,000 Accounts and Papers, 800 Annual Reports and about 5,000 items taken out of the 1,100 volumes of the Parliamentary Debates. The whole stretches over a period of 200 years and is arranged in chronological order. The four types of material are kept distinct but are recorded on the basis of an identical classification comprising 130 headings. Consequently, under each heading which refers to a given problem of criminal science and legislation the student will find all reports, all accounts and papers, all annual reports and all Parliamentary Debates referring to the problem during the last 200 years. Each paper is recorded according to its full parliamentary description and a student can find it without difficulty in what is called the *Bound Set of Parliamentary Papers* available in the most important libraries of this country, and also in certain libraries overseas.

It will be plain that the mass of material to be read has been very great. In the course of reading we extracted important portions, which were either typed out *in extenso* or else appropriately summarised by us. The material thus accumulated amounts now to about 12,000 pages, all bound and arranged in the same way as the original material recorded in the Sources, but it is not yet fully brought up to date and digested. It is complete for the years 1750—1830 and we hope soon to begin to write a survey of the English criminal legislation for that period.

The whole scheme is of very considerable dimensions and, although we have completed an important stage, we fully realize how much still remains to be done.

ONE HUNDRED YEARS OF LUNACY ADMINISTRATION*

T. C. S. Keely

THE history of lunacy administration can be traced back with reasonable certainty to 1339, the assumed date of the Statute de Prerogativa Regis, which limited the King's jurisdiction (already existing) over the estates of idiots or natural fools, whose profits he was to take, but for whom he was to find necessaries. For anyone 'that beforetime hath had his wit and memory' and should 'happen to fail of his wit' or, as would now be said, became a lunatic or of unsound mind, the King was to keep his estate safe and maintain him and his household competently out of the profits, but the King was to take nothing for his own use. By the Statute 32 Hen. VIII, c. 46 (1540), which established the Court of the King's Wards, the residue on the lunatic's death was to be paid over to his Executors or Administrators.

This Court exercised the Royal Prerogative over Idiots and subsequently also over Lunatics until the Stat. 12 Car. II, c. 24 (1661), whereby its exercise was transferred to the Lord Chancellor, with whom were subsequently joined by the Stat. 14 & 15 Vict. c. 83 (1851), two Lords Justices of Appeal in Chancery to whom the Sign Manual was directed. The jurisdiction is now exercised, after receipt of a Warrant under the Sign Manual, by the Lord Chancellor and all the Lords Justices of Appeal, one, or more, of whom constitutes the Judge in Lunacy. Specific powers to perform particular acts have been conferred by statute from time to time and notably by the Lunacy Act, 1890, but the list of powers there detailed has never been treated as exhaustive, and it cannot be doubted that under the Royal Prerogative an inherent jurisdiction survives to do whatever is necessary for the benefit of Lunatics, though to adduce specific statutory authority for any particular act might not be possible.

It is difficult to trace early details of the staff required to assist in the exercise of the Lord Chancellor's lunacy jurisdiction, but in 1798 it is found that there was a Secretary of Lunatics (with duties similar to those of Chancery Registrars), a Clerk of the Custody of Idiots and Lunatics, and five Commissioners in Lunacy.

The process of law to determine whether grounds for the exercise of the Royal Prerogative had arisen was, and still is, the Inquisition, the origin of which can be traced to the reign of Edward II, though it must have existed in some form before that period. From that reign Inquisitions were held by Escheators, originally ten in number for the whole Kingdom, and later one for each county. The provision that the Inquisition should

* An abridged version of this article was published in *The Times*, Oct. 27, 1942. The Times Publishing Company have kindly consented to its publication in full in the Cambridge Law Journal.—Ed.

be openly and by Indenture was re-enacted by the Stat. 36 Edw. III, c. 13 (1362). The duties of the Escheators and their juries were regulated and consolidated by the Stat. 1 Hen. VIII, c. 9 (1509), one panel of the Indenture was to be delivered to the Jury (as a check on the Escheator) and filed by the Clerk of the Petit-Bag.

When the inconvenience and expense of the conduct by Escheators of these proceedings came to be recognized, a Commission under the Great Seal was directed to five persons, any three of whom could hold the Inquiry. This number was reduced by the Stat. 3 & 4 Will. IV, c. 36, s. 1 (1833), to one or more, and by the Stat. 5 & 6 Vict. c. 84 (1842), two permanent Commissioners in Lunacy were appointed.

By a General Order under this last Statute, dated 27th October, 1842 (100 years ago), Lord Lyndhurst, Lord Chancellor, abolished the office of Clerk of the Custody and transferred his duties and also the duties as to lunatics of the Masters in Ordinary in Chancery to the two newly established Commissioners. The title of ' Commissioners ' was however required for another body, now known as the Board of Control, and the two Commissioners of 1842 were in 1846 re-named the Masters in Lunacy.

The jurisdiction of the Judge in Lunacy was, with certain reservations, made exerciseable by the Masters in Lunacy by the Lunacy Act, 1891, s. 27, and subsequent Acts. By the Lunacy Act, 1922, the number of Masters was reduced to one and an Assistant Master was added, and by virtue of the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 8, three more Assistants have since been appointed. Under Rule 13 of the Rules of 1934 appeals from any of the above lie to the Judge in Lunacy. Provision was made by the Lunacy Act, 1908, s. 4 (repealed and re-enacted by the Supreme Court of Judicature Act, 1925, s. 116), for the appointment of a Deputy Master, but it has never yet been necessary to take advantage of this power.

By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 124, the Department was made an office of the Supreme Court.

The list of Masters and Assistant Masters is as follows:—

MASTERS

Francis Barlow Commissioner, 1842—46, Master, 1846—80.
Edward Winslow Commissioner, 1842—46, Master, 1846—59.
William Frederick Higgins, 1859.
Samuel Warren, 1859—77.
William Norris Nicholson, 1877—89.
(Sir) Henry Shore Lowndes Graham (K.C.B.), 1880—86.
James Redford Bulwer, Q.C., 1886—99.
Sir Alexander Millar, Q.C., 1889—91.
(Sir) Francis William Maclean, Q.C., 1891—96.
Thomas Halhed Fischer, K.C., 1896—1914.
William Ambrose, K.C., 1899—1907.

(Sir) Henry Studdy Theobald, K.C., 1907—22 (Sole Master from August, 1921).
Rt. Hon. Sir David Brynmor Jones, P.C., K.C., 1915—21.
Gerard Moresby Thoroton Hildyard, K.C., 1923—28.
Sir Henry Tindal Methold, 1928.

ASSISTANT MASTERS

Ralph Cudworth Romer, 1921—33.
Gerald Edgell Mills, O.B.E., 1933—37.
William Henry Hooper, 1933—35.
Arthur Hampden Ronald Wastell Poyser, C.B.E., 1935.

ASSISTANTS TO THE MASTER

Frank Louis Ratto, M.C., 1935.
Cecil Guy Ridley, C.B.E., 1935.
Thomas Calder Southwell Keely, 1937.

The Masters' principal officer has always been the Chief Clerk. He acts as secretary to the Department and combines in his own person functions similar to those of a regimental Adjutant and Quartermaster. The duties of the Registrar in Lunacy were in 1883 transferred to him, by reason whereof (and in accordance with Rule 14 of the Rules of 1934) he sits in Court or attends the Lords Justices when dealing with lunacy matters.

A list of the Chief Clerks follows:—

CHIEF CLERKS

H. Enfield, 1842—64.
John Stewart, 1864—91.
Joseph Elmer, 1891—92.
Richard Keating, 1893—97.
Thomas Alexander Southwell Keely, 1897—1912.
Richard Russell Prichard, 1912—21
Ralph Cudworth Romer, 1921.
Gerald Edgell Mills, O.B.E., 1921—33.
Arthur Hampden Ronald Wastell Poyser, 1933—35.
Thomas Calder Southwell Keely, 1935—37.
Alfred John Johnston, 1937.

ASSISTANT CHIEF CLERKS

Alfred John Johnston, 1935—37.
Richard Henry French, M.C., 1937.

Taxation of costs, which, until 1889, had been dealt with by the Chancery Taxing Masters, was then transferred to the Masters' office and dealt with by the Chief Clerk and two assistants. The Lunacy Rules of 1892 laid down that costs should 'be taxed by and under the

direction of the Masters,' and this work now occupies the whole time of the Taxing Officer and five other clerks and the certificate of taxation is issued under the Master's Seal.

From 1842 to 1845 the Masters' office was in Southampton Street, Bloomsbury, whence it was removed to 45, Lincoln's Inn Fields; it remained there until 1880, when it was transferred to the Royal Courts of Justice and continued there until 9th September, 1939, when it was evacuated for the period of the War to St. Michael's Court, Gonville and Caius College, Cambridge. The office of the Registrar in Lunacy was in Quality Court, Chancery Lane, until 1883 when his duties and staff were transferred to the Masters' office.

The following comparative tables, showing at various dates the numbers of cases under administration and the numbers of the staff sanctioned to deal with them (which have never kept pace with the former) illustrate the growth of the office and the increase of its business.

Notable increases took place shortly after the Act of 1890, whereby facilities for administration were widened and expenses of procedure reduced, and again after the last war when the effects of war strain, shell-shock and the like became apparent.

Cases under Administration.		Staff.	
—	—	1842	4
—	—	1862	9
—	—	1872	12
—	—	1879	14
1890	1,200	1890	16
1904	3,580	1904	17
1914	5,493	1914	18
1920	6,033	1921	24
1931	10,410	1934	75
1933	12,094	1935	119
1938	20,768	1939	130
1941	24,347	1941	130

Since 1911 each case has been given a reference number which it retains throughout its currency.

During the first Great War, 1914—18, all the seven members of the staff of eighteen who were of military age and physically fit served in H.M. Forces, one being wounded, and their places were to some extent filled by relatives or friends of the remaining staff. For many years after 1918 an essential qualification for all new appointments to the office was service in one of H.M. Forces.

At the beginning of the second Great War in 1939 the staff was composed of 113 men and seventeen women, and of these five have joined the Royal Navy, twenty-six the Army, thirteen the Royal Air Force (one of whom has been killed, and one is reported missing), and four the Nursing Services. Many others are giving voluntary spare-time service in the Home Guard and various Civil Defence Services. The places of most of those on active service have been taken by women clerks recruited through the local Employment Exchange.

The career of the office has not been without its hazards and assaults, and since its independent course started in 1842 more than one attempt to abolish it or absorb it in some other Department has been proposed, but defeated. The great consolidating Act of 1890 (of which Sir Henry Theobald was the principal draftsman) contains provision in section 337 for the amalgamation of the Masters' office with those of the Lord Chancellor's Visitors and of the Commissioners in Lunacy (now Board of Control), and many advantages might have accrued if this had been done. In 1912 it was intended that all three offices should be housed in the building at the corner of Lincoln's Inn Fields, then being planned for the Public Trustee, but his staff occupied all the accommodation, and when, in 1920, the Board of Control was absorbed in the Ministry of Health the opportunity for amalgamation was lost and is hardly likely now to recur.

In 1904 a Royal Commission was appointed to enquire into the Care and Control of the Feeble-minded. The scope of the enquiry was extended in 1906 to include also the care of Lunatics. The Report of this Committee, dated 10th July, 1908, recommended the abolition of the Masters and the transfer of their business to the Chancery Division. In 1909 a Committee, set up by the Lord Chancellor under the chairmanship of Lord Cozens-Hardy M.R. (who had supported the transfer before the Royal Commission) considered the matter and reported against it. The question was brought up again before the Tomlin Committee, appointed in 1920 to consider establishment questions, and they reported that amalgamation with Chancery was undesirable and impracticable.

Lord Cozens-Hardy presided over another Committee in 1912 which considered establishment and salary questions and so great had been the increase of work as compared with that of staff that in 1934 a further Committee was set up under Sir J. Fischer Williams who recommended the establishment of which the office, with minor modifications, is now constituted.

The old title of the Department, 'the Office of the Masters in Lunacy,' was dignified and descriptive, but to conform with the Mental Treatment Act of 1930 this was altered to the obscure and cumbersome designation, 'Management and Administration Department,' which leads to doubt and confusion at home and abroad and under which the Department now labours. If an ornate *alias* is essential, it would be hard to find a better title than 'The Court of the King's Wards.'

It can occasion little surprise that an office, which by the nature of its business, necessarily intrudes into the intimate private affairs of persons of every rank and class from highest to lowest, and almost always at a period of emotional strain, should incur a good deal of resentment and occasionally obstruction, but it has always been the aim of the Masters and the directing members of the staff that control, though firm, should be exercised with as much tact and as little officiousness as possible. Many expressions of appreciation are received from members of the widespread public whom the staff are proud to serve, and it is hoped that their reputation, long since won, for courtesy and consideration, is still deserved and will always so continue.

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REFLECTIONS ON PROFESSOR CHAFEE'S FREEDOM OF SPEECH IN AMERICA

D. W. Logan

THOUGH Professor Chafee is best known in this country as an equity lawyer, he has won eminence in the United states as an upholder of civil liberties. His book on *Freedom of Speech*, which was published in 1920, vigorously denounced the use of war legislation to curb the expression of unpopular left-wing views, and he followed this up in 1928 with a collection of interesting essays called *The Inquiring Mind*. With two associates he prepared the famous *Report on Lawlessness in Law Enforcement* for the Wickersham Commission, and in 1932 the *Mooney-Billings Report*, which is recognized as an authoritative statement of the facts in that *cause célèbre*. Of the present work[1] he says in the preface: 'What I have done is to fuse in this book all my ideas past and present on freedom of speech.'

The title might lead the unwary to the conclusion that here was yet another American book of little interest to the English reader. Nothing could be farther from the truth. Though Professor Chafee inevitably spends much time discussing cases which turn on the interpretation of the First and Fourteenth Amendments to the Constitution of the United States, he always has the wider issues in mind.

> 'Our interest, however, is in wisdom rather than constitutionality, not in what the Government *cannot* do but in what it *ought not* to do. Much that is constitutional may be unwise.'[2]

Moreover, he deals with all facets of the subject. In addition to discussing the obvious topics, he shows the important effects of by-laws governing the distribution of handbills, of taxes on newspapers, of the power to exclude newspapers and periodicals from cheap mailing facilities, of the strict enforcement of safety regulations concerning buildings against owners of halls who are unwise enough to let them for left-wing meetings, and of discrimination in naturalization proceedings. He also discusses the censorship of books, plays and films and puts forward some novel ideas for amending the existing system. His views carry all the more conviction because he is so patently pleading for a fair hearing to be given to people for whose opinions he entertains the greatest distaste, and because he is honest enough to admit the connection between unpopular economic views and most sedition legislation. He remarks that 'sedition

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[1] Free Speech in the United States, Cambridge, Mass. : Harvard University Press, 1941, xiv and 634 pp., $4; London: Humphrey Milford, Oxford University Press, 22*s*. 6*d*. All references in these footnotes are to this book unless otherwise stated.

[2] P. 232.

laws do not seem to catch any really dangerous leaders,'[3] and elsewhere he is even more frank:—

> 'It is all very well to say that we need a sedition law to use against Nazis and Fascists, but if the Alien Registration Law of 1940 is thus employed, it will be almost the first time to my knowledge that a sedition Act has been enforced against powerful men with money. The lamentable truth, which as a former employer I hate to admit, is that sedition laws operate in practice as a device to keep down the agitation of discontented workmen.'[4]

I wish that there was as dispassionate and well-documented book as Professor Chafee's on all the aspects of freedom of speech in this country. The trouble is that most of the people in this country who advocate views similar to his, manage to give one the impression that if they were in power they would certainly not accord to their political opponents the same degree of liberty of discussion as they now claim for themselves. There are, however, notable exceptions. When the Cabinet was persuaded in 1934 to introduce the Incitement to Disaffection Bill by the English counterparts of the people who were responsible in the United States for section 1 of the Aliens Registration Act, eminent lawyers, led by Sir William Holdsworth, aroused an influential section of public opinion to agitate successfully for important modifications. Similarly, when Hewart L.C.J. decided in *Lewis* v. *Cattle*[5] that the Official Secrets Acts made it an offence for a journalist who had written an article on facts obtained from a policeman not to disclose the source of his information, contrary to the assurance which he himself had given when he introduced the 1921 Official Secrets Bill in the House as Attorney-General,[6] Parliament was moved to pass remedial legislation even in war time.[7]

Moreover, academic writers are adopting the realistic approach to the problems of freedom of discussion. Examples of this are Professor Goodhart's article on *Public Meetings and Processions*[8] and Dr. Wade's Appendix on *Public Meetings and Liberty of Discussion* in the ninth edition of *Dicey's Law of the Constitution*. This attitude is not reflected in text-books, however, which fail to mention 'D' notices[9] and to stress the importance of the rules which make printers, publishers and distributors liable for defamation. Above all, one misses a discussion of the basic issue, the point at which freedom of discussion must bow to the higher good of public safety and security.

Professor Chafee crystallizes the matter early on in his book:—

> 'Let us recognize the issue as a conflict between two vital principles,

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[3] P. 513.

[4] P. 484.

[5] [1938] 2 K. B. 454.

[6] See H. C. Deb. (5th Series), v. 353, col. 786.

[7] 2 & 3 Geo. VI, c. 121 (23 Dec. 1939).

[8] 6 Cambridge Law Journal, 161 (1937).

[9] See H. C. Deb. (5th Series), v. 345, col. 2792 *ff.* and 3088 *ff.* Twenty-eight such notices were issued in the six months preceding April 19th, 1939: *id.*, v. 346, col. 338.

> and endeavour to find the basis of reconciliation between order and freedom.'[10]

Later he says:—

> '. . . it is useless to define free speech by talk about rights . . . in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right.'[11]

This analysis of the problem is of exceptional value in time of war when the opposing interests are more difficult to reconcile. In this country the conflict has been most pronounced over the right of detention conferred on the Home Secretary by Defence Regulation 18B, which has been much criticized in Parliament. The focal point for academic discussion has been the decision of the House of Lords in *Liversidge* v. *Anderson*,[12] and the Courts have not been silent.[13] Freedom of discussion has been less in the public eye. Perhaps this is due to the bewilderment of many left-wing partisans resulting from the Soviet pact with Germany in August, 1939, and the Soviet invasion of Finland in 1940. The only important controversy has been the ban imposed on the *Daily Worker* by the Home Secretary under the powers conferred on him by D.R. 2D and D.R. 94B,[14] and the threat to use those powers against the *Daily Mirror*.[15] But there are many other Defence Regulations affecting freedom of speech and discussion which are very widely phrased. Those more directly in point are D.R. 2C (corruption of public morale), D.R. 39A (seducing persons from duty and causing disaffection), D.R. 39B (propaganda), D.R. 39BA (publication of disturbing reports), D.R. 39C (display of flags), and D.R. 39F (processions and meetings). It is interesting to note that none of these Regulations formed part of the original text and that prosecutions for breaches of most of them must be instituted by the Attorney-General or the Director of Public Prosecutions. Moreover one must not overlook the ancillary power of search conferred by D.R. 88A, the right to arrest without warrant under D.R. 88C, and D.R. 90 (1), which says:—

> '. . . any person who attempts to commit, conspires with any other person to commit, or *does any act preparatory to the commission of*, an offence against any of these Regulations, shall be guilty of an offence against that Regulation punishable in like manner as the said offence.'[16]

Also there are other Defence Regulations which do not on their face appear to affect freedom of speech, but which, nevertheless, have been

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[10] P. 8. [11] Pp. 31—32.

[12] [1942] 1 A. C. 206. See 58 Law Quarterly Review, 1 (Sir William Holdsworth), 3 (Professor Goodhart), 232 (Mr. C. K. Allen), and 243 (Professor Goodhart) (1942); 5 Modern Law Review, 162 (Professor Keeton) (1942).

[13] Cf. the remarks of Humphreys J. in *The Times*, 19 Jan. 1943.

[14] 21 Jan. 1941; see H. C. Deb. (5th Series), v. 368, col. 463. The ban was withdrawn in the summer of 1942.

[15] *Id.*, v. 378, col. 1665. [16] Italics supplied.

used to control discussion. For example, the power to make by-laws under D.R. 14 governing the conduct of persons entering areas declared 'protected places' under D.R. 12, has been used to interfere with the holding of meetings and the distribution of literature.[17] In addition there is the censorship the scope of which is difficult to estimate, and only the Minister of Home Security can know what use has been made by Regional Commissioners of their powers under D.R. 84A to make by-laws.

The truth is, however, as Professor Chafee says, that 'in the long run the public gets just as much freedom of speech as it really wants.'[18] But that old maxim, *vigilantibus non dormientibus aequitas subvenit*, might with profit be adapted to apply to the present situation. You must keep your eyes open to detect and crush incipient attacks on freedom of discussion. Too many people, both secretly and openly, share the views of Colonel Blimp:—

> 'I am a staunch upholder of the sacred British Freedom of the Press, but we can't let the wrong kind of people say or write what they like, especially with education rampant among the lower classes.'[19]

What must be realized is that the only thing which matters in practice is the liberty to express unpopular views, for no one is likely to meet with suppression if he voices sentiments which are acceptable to the community at large. As Scrutton L.J. said in *Ex parte O'Brien*:—

> 'You really believe in freedom of speech, if you are willing to allow it to me whose opinions seem to you wrong and even dangerous.'[20]

Professor Chafee, as usual, sums up the position admirably:—

> 'The danger is not in the suppression of any particular doctrine or group, but in the very existence of suppression. . . . Intolerance is the most contagious of all diseases, *and no party or creed is immune* . . . Intolerance can always find some crevice in the administration of the law through which to creep and accomplish its purpose. The only remedy is to build up every day and every hour the opposite spirit, a firm faith that all varieties and shades of opinion must be given a chance to be heard, that the decision between truth and error cannot be made by human beings, but only by time and the test of open argument, so that each citizen may judge for himself.'[21]

Perhaps the most moving parts of the whole book are those in which Professor Chafee develops the thesis that it was the harsh application of the sedition laws in the years 1917—1920 against persons holding liberal and radical views which prevented the creation in the United States of a well-informed public opinion which would have put into effect President Wilson's war aims for a new world. We hope that at the end of the present hostilities there will be no repetition of that disastrous step on either side of the Atlantic.

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[17] National Council for Civil Liberties, Monthly Bulletin, September, 1940.
[18] P. 564.
[19] See his article, 'Was Low Right?', *Evening Standard*, 15.1.43.
[20] [1923] 2 K. B. at p. 382.
[21] Pp. 527—528; italics supplied.

NOTES ON RECENT CASES

CONSTITUTIONAL LAW—CONSCRIPTION OF DUTCHMAN RESIDENT IN ENGLAND—VALIDITY OF DECREE OF QUEEN OF NETHERLANDS ORDERING CONSCRIPTION HELD TO BE OPEN TO INVESTIGATION BY ENGLISH COURTS—ARREST OF DUTCHMAN AS A DESERTER UNDER ALLIED FORCES ACT, 1940, AND ORDER OF 1940 MADE THEREUNDER.

Re Amand (No. 2). [1942] 1 K. B. 445.

The applicant, a Dutchman resident in England, obeyed under protest a Netherlands decree, of August 8th, 1940, calling him up for service. Subsequently he was arrested as a deserter under the Army Act, s. 154, as applied under the Allied Forces Act, of August 22nd, 1940, and an order in Council made under that Act. There were two applications to the High Court for a writ of *habeas corpus* (the first is reported [1941] 2 K. B. 239); the only difference in the second application was that further evidence as to Dutch law had been obtained. The Attorney-General informed the Court that Queen Wilhelmina and her government were recognised as the sovereign and government respectively of the Netherlands, and were exclusively competent to perform the legislative, administrative and other functions appertaining to the law of the Netherlands. The applicant contended that the decree was illegal and unenforceable under English law, and that it was illegal under Dutch law. On behalf of the Dutch government it was submitted that the mere production of the Dutch decree was conclusive of its validity in Netherland's law.

In the second application, Wrottesley J. pointed out that although no foreign army could be recruited in England the Allied Forces Act made this legal. What a foreign government could not do was to secure the enforcement of its own legislation without Parliamentary sanction. He decided that the Court was entitled to enquire into the validity of the Dutch decree. Consequently he attempted to distinguish the case from *Luther* v. *Sagor & Co.* [1921] 1 K. B. 456, 548, and *Paley Olga* v. *Weisz* [1929] 1 K. B. 718, in which it was held that the validity of Acts of an independent sovereign government in relation to property and persons within its jurisdiction cannot be questioned in this country. He declared that the dictum in these cases did not refer to the Acts of a sovereign government which were meant to take effect outside sovereign territory. Amand appealed to the Court of Appeal and House of Lords but the appeal was dismissed on the preliminary point that it was a criminal cause or matter.

It is of interest to note that, in *Haak* v. *The Minister for External Affairs* [1942] A. D. 318, the Cape Provincial Division held that similar legislation was valid. The question as to what Amand's position would have been if he had never joined the Dutch forces is still left open. It is respectfully submitted that the decision does not convincingly succeed in distinguishing the dictum in *Luther* v. *Sagor & Co.*

P. I. B.

CONSTITUTIONAL LAW—NATIONALITY—POSITION OF EIRE—BRITISH SUBJECT—IRISHMAN HELD NOT TO HAVE LOST BRITISH NATIONALITY.

Murray v. *Parkes.* [1942] 2 K. B. 123.

This was an appeal by way of case stated from a conviction under the National Service (Armed Forces) Act, 1939, for failure to submit to a medical examination. The appellant contended that he was not a British subject. He was born in 1908 in that part of Ireland now known as Eire. Since 1934 he had lived in England, but he had an Irish domicil.

For the appellant it was argued that the Statute of Westminster, 1931, had given Dominions the right to secede from the British Commonwealth: that Eire had exercised that right in the Constitution of Ireland of December, 1937, in which the Crown found no place, and which declared that 'Ireland is a sovereign, independent, democratic state': that by the Eire (Confirmation of Agreement) Act, 1938, the British Government had acknowledged the independence of Eire: and that the inhabitants of Eire, including the appellant, had thereby ceased to be British subjects.

The Court first considered the contention that Eire had become independent. Because no further appeal lay in this case, they were reluctant to pronounce upon the matter; but the Lord Chief Justice expressed the opinion that the Statute of Westminster, in removing all restrictions on Dominion legislation, had given no right to secede, and that in fact the Government of Eire had never professed to exercise the suggested right.

Secondly the Court held that, even assuming that Eire had seceded, appellant was still British. Under the British Nationality and Status of Aliens Act, 1914, he was a born British subject. Nothing had deprived him of that status. Admittedly inhabitants of ceded territory ordinarily lose British nationality; *Doe* d. *Thomas* v. *Acklam* (1824) 2 B. & C. 779: but appellant was not an inhabitant; he had come to England before the suggested separation and resided here ever since. His domicil was immaterial. By the Irish Free State Constitution Act, 1922, he had become an Irish citizen within the wider British nationality: the Court considered that that was also the true effect of the Constitution of 1937. The appeal was dismissed.

The most interesting part of this case is the discussion of the position of Eire, but undoubtedly the Court was right in deciding the matter independently of that question.

S. F. C. M.

CONTRACT—ARBITRATION CLAUSE RELATING TO ANY DISPUTE 'ARISING IN RESPECT OF THIS AGREEMENT' HELD TO COVER A DISPUTE AS TO WHETHER CIRCUMSTANCES HAD PUT AN END TO CONTINUANCE OF THE CONTRACT.

Heyman v. *Darwins, Ltd.* [1942] A. C. 356.

In a contract between A and B, an arbitration clause provided that 'if any dispute shall arise . . . in respect of this agreement . . . the same shall be referred for arbitration in accordance with the . . . Arbitration Act, 1889.' Disputes arose; an action was brought by A for a declaration that B had 'repudiated and/or evinced an intention not to perform' the agreement, and claiming damages. B denied repudiation of the contract, and applied for the action to be stayed under the Arbitration Act, 1889.

Held by the House of Lords that the dispute fell within the terms of the arbitration clause and that the action ought to be stayed.

A's main argument was that B had repudiated the contract by failing to perform it, and by B's conduct in claiming that A had repudiated, by the issue of the writ, and that B had accepted the repudiation; that, therefore, the contract was at an end, and B could not rely on a clause in it, *i.e.*, the arbitration clause.

The Court laid down that even where the repudiation of a contract by one party is followed by acceptance of that repudiation by the other, the contract has come to an end only in the sense that both parties are discharged from further performance of it. They are still bound by the arbitration clause. Where the parties are agreed that they have entered into a binding agreement, the arbitration clause will apply even though one party alleges that the contract has come to an end by an accepted repudiation or by frustration. The decision of the Judicial Committee of the Privy Council in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.* [1926] A. C. 497 was questioned in so far as it decided the contrary with respect to frustration. Viscount Simon L.C. (at p. 366) thought the case would be otherwise if the dispute were as to whether there had ever been a valid contract and not merely as to whether an originally valid contract had been ended by frustration or otherwise.

This decision serves to clear up many doubts which had been raised by the dicta in earlier cases.

R. E. T.

CONTRACT—COVENANT IN RESTRAINT OF TRADE—GIFT BY COVENANTOR OF CAPITAL TO ESTABLISH COMPETING BUSINESS—PROCURING BREACH OF CONTRACT.

Batts Combe Quarry, Ltd. v. *Ford.* [1942] 2 All E. R. 639.

The B. Co. purchased a quarry business from F, who covenanted that for ten years he would not, within seventy-five miles of the quarry, ' carry on or assist in carrying on or be engaged, concerned, interested or employed in the business of a quarry.'

Three years later F gave money to his sons to enable them to commence a quarry business on land adjacent to that of the appellants. Further, he helped them in negotiations for purchasing machinery. The sons knew of the restrictive covenant.

B Co. sued F and his sons, alleging that F had broken his covenant and that the breach had been procured by F's sons.

The Court of Appeal held that F had broken his covenant, but that the sons had not procured that breach.

Lord Greene M.R. upheld the decision of Bennett J. in the Court below that no evidence supported the contention that the father owned the business or was in partnership. Dealing with the point that the sons had procured a breach of contract, he said, ' mere acceptance of a proffered bounty given in breach of covenant cannot . . . be said to be in any sense a procuring of a breach of contract ' (p. 640). As to F's assistance in the negotiations for the machinery, the claim in respect of that was not properly pleaded, but even if it had been, only nominal damages could have been recovered.

With regard to the alleged breach of covenant by the father, Lord Greene held that Bennett J. had construed the words ' assist in carrying on,' too narrowly, and that the words should cover a person providing necessary capital. He held, further, that by providing money and assisting in negotiations the father was ' concerned ' in the business, and regarding the negotiations was ' employed in the business.'

Allowing the appeal on the allegation of a breach of covenant by the father, Lord Greene said an injunction could not properly be sought, and awarded an inquiry as to damages.

The case rests on the interpretation of the covenant. It establishes that the tort

of procuring a breach of contract requires more than the acceptance of proffered bounty. There seems to be no previous authority for the decision that the free gift of capital amounts to a breach of covenant. It will be of interest in future decisions to learn whether any distinction will be made between a free gift of capital and a transfer involving remuneration.

B. M. S.

CONTRACT—FRUSTRATION—SALE OF GOODS—PRICE PARTLY PAID IN ADVANCE—DELIVERY PREVENTED BY ENEMY INVASION—BUYER HELD ENTITLED TO RETURN OF SUMS PAID.

Fibrosa Spolka Akcyjna v. *Fairbairn, Lawson, Combe, Barbour, Ltd.* [1942] A. C. 32.

The respondents contracted in July, 1939, to deliver goods to the appellants, c.i.f. Gdynia. In September, 1939, Gdynia was occupied by the enemy. The contract provided: (1) if despatch of the goods was impeded by certain happenings, including a war, a reasonable extension of time should be given; (2) one-third of the purchase price should be paid when the goods were ordered. The appellants paid £1,000 on account in July, 1939, and after September sought to recover it on the ground that the contract was frustrated because the goods could not be delivered.

It was held by the House of Lords:—

(1) That the express term in the contract contemplated only a temporary hindrance of performance and did not apply to the prolonged prevention of delivery occasioned by the enemy's presence in Gdynia. (2) That where supervening events, not due of the default of either party, render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, the contract is frustrated, even though the parties may have provided for the case of a limited interruption. (3) That in English law, where a contract is executory on one or both sides and it is frustrated, the parties, although discharged from further performance, remain subject to such liabilities, and must give effect to such rights, as have accrued under the contract before the event causing frustration. Nevertheless the rigour of this doctrine is mitigated by the right given to a party to such a contract who has paid money thereunder to recover it as money had and received to his use, if the consideration in respect of which it was paid has wholly failed. This was the new point of law laid down in the decision. (4) That in this case the contract was frustrated, and the respondents' failure to deliver the goods amounted to a total failure of consideration, so that the appellants could recover the £1,000 paid in advance.

The judgment overrules the case of *Chandler* v. *Webster*, [1904] 1 K. B. 493, in which it was erroneously held that the doctrine of recovering money on a total failure of consideration has no application to frustrated contracts unless the effect of frustration is to render the contract void *ab initio*.

A. R. R.

CONTRACT—OFFER AND ACCEPTANCE—CONDITIONAL ACCEPTANCE—'SUBJECT TO THE TERMS OF A FORMAL AGREEMENT TO BE PREPARED'—HELD, NO CONTRACT.

Spottiswoode, Ballantyne & Co., Ltd. v. *Doreen Appliances, Ltd.* [1942] 2 K. B. 32.

The defendants made an offer to the plaintiffs to take a lease of their premises, which was accepted, subject, *inter alia*, 'to the terms of a formal lease to be prepared by their [the plaintiffs'] solicitors.' The defendants received a draft of the agreement, and went into possession forthwith. A fortnight later the plaintiffs gave notice of

their intention not to complete the agreement. They then brought an action to recover possession, and the defendants counterclaimed for specific performance of the alleged agreement to grant them a lease.

In the Court of first instance, Atkinson J., distinguishing the present case from earlier decided cases, on account of the different words employed, held that there was a binding contract. The Court of Appeal reversed his decision, holding that this was not so until a formal agreement had been executed. Lord Greene M.R., with whom Mackinnon and Goddard L.JJ. agreed, could not allow that the saving words employed here amounted merely to a condition, on the fulfilment of which there would emerge a binding contract. He pointed out that the defendants, in their correspondence, had agreed to vacate the premises ' when called upon, if no formal agreement is entered into,' which showed that they had in mind the execution of a proper document. He added that the words used by the parties were equivalent to the more usual expression ' subject to contract ' which has long been settled to show that ' the intention of the parties is that neither of them is to be contractually bound until a contract is signed in the usual way ' (at p. 35; so, too, *Keppel* v. *Wheeler* [1927] 1 K. B. 577; cited by Goddard L.J. at p. 37). Lord Greene, in discussing the cases distinguished by Atkinson J., quoted (at p. 36) Lawrence L.J. in *Raingold* v. *Bromley* [1931] 2 Ch. 307, at p. 316, and declared that he was unable to draw any such fine distinctions between the language used in the earlier cases, and the language used in this, as Atkinson J. had done. Goddard L.J. said that if the argument of the defendants were upheld, it would be necessary to depart from a line of authorities consistently expressing the contrary view.

Although this case does not express any new principle of law, it presents a valuable epitome of the rule evolved by the Courts over a period of years, that a contract to enter into a contract has no binding force whatever. Cf. *Chillingworth* v. *Esche* [1924] 1 Ch. 97, per Sargant L.J. at pp. 113—4.

E. H. D.

Criminal law—(a) Receiving stolen property—Possession of stolen Goods —Rendering assistance in disposal without actual possession — (b) Numerous counts against a number of prisoners—Separate trial.

R. v. *Shaw*; *R.* v. *Agard*. [1942] 2 All E. R. 342.

The case arose out of a series of transactions with regard to motor-cars. The indictment contained twenty-two counts, concerned six persons, related to sixteen motor-cars, and the period covered nine months.

Count 8 accused S, A and X of receiving a Ford car (X pleaded guilty). X sold the car, and the buyer said, that as far as he knew, S and A had nothing to do with the transaction. The case against S and A rested on the evidence of X and his former mistress Y. According to them S was with X, when X was driving the car to the place of delivery; both S. and A helped to alter the appearance of the car; S was near by when X completed the sale; and X gave the purchase-money to S. Both accused denied all this.

The deputy-chairman of quarter sessions directed the jury that the essential ingredients of receiving were (i) the theft of the goods, (ii) the taking of the goods by the prisoner into his possession, (iii) knowledge by the prisoner at the time the goods were taken into his possession that they were stolen. S was found guilty of stealing one car and receiving four others; A was found guilty of receiving three cars.

On appeal, the Court of Criminal Appeal held that (i) in the absence of a direction to the jury as to the meaning of possession in law, the convictions on count 8 must be quashed. If the stolen property remains in the exclusive possession and under

the exclusive control of one person, another person, who may even have rendered assistance in the disposal of the property, cannot be convicted of receiving; (ii) where there are a large number of counts, it is desirable that the trial should be divided into such parts that the jury can retain a proper grasp of the material evidence.

Both parts of the judgment are eminently reasonable. In many charges of receiving, the prisoner undeniably has had the goods in his possession. But here the evidence intended to establish possession in law was very meagre. It was unreasonable to expect that a jury could grasp and retain the evidence in its entirety, as it concerned the separate counts and the individual prisoners. It must be noted that the division of complicated indictments is not obligatory, but is only discretionary (cf. *R.* v. *Greenberg* [1942] 2 All E. R. 344). The Bench has remarked on the danger of this type of indictment on previous occasions (*R.* v. *King* [1897] 1 Q. B. 214; *R.* v. *Carless* (1934) 25 Cr. App. R. 43); it is time that some more efficacious method was used to remove the possibility of a grave injustice to the accused.

J. A. H.

PERSONAL PROPERTY—CHOSE IN ACTION—ASSIGNMENT OF JUDGMENT DEBT—PRIORITY AS BETWEEN EQUITABLE ASSIGNEE AND SUBSEQUENT GARNISHOR—EFFECTIVE DATE OF NOTICE—LAW OF PROPERTY ACT, 1925, s. 136.

Holt v. *Heatherfield Trust, Ltd.* [1942] 2 K. B. 1.

P obtained a judgment debt against the C Co. On the 14th June, 1940, P assigned the judgment debt absolutely to X, the plaintiff, in part payment of a debt owed by P to X. X received the assignment on the 15th. On June 17th, H Co., the defendants, served on the C Co. a garnishee order *nisi*. The same day, X sent notice of the assignment to the C Co., who received it on the 18th.

The H Co. submitted that on June 17th, when the garnishee order became effective, the plaintiff's title was incomplete as being only an equitable assignment, until notice was given to the C Co. on June 18th; and that the assignment, being made without consideration, was of no avail as against a garnishee order. The plaintiff contended, on the wording of the Law of Property Act (s. 136), that the date of notice was the date when notice was despatched.

Atkinson J., however, held that notice became effective only when received. Absence of notice nevertheless did not affect the efficacy of the transaction as between assignor and assignee. Until notice, it was merely an equitable assignment, but required nothing more from the assignor to become a legal assignment. In such a case the assignee can either give notice or bring an action before notice if he joins the assignor as plaintiff or defendant. (*Performing Rights Society, Ltd.* v. *London Theatre of Varieties, Ltd.* [1924] A. C. at pp. 18—19.) On the authority of *Badeley* v. *Consolidated Bank* (1888) 38 Ch.D. 238, and *Re General Horticultural Co.* (1886) 32 Ch.D. 512, a garnishee order binds only so much of the debt owing to the debtor from a third party, as the debtor can honestly deal with at the time the garnishee order is obtained and served. The debtor cannot honestly deal with the sum he has already assigned; the garnishor is in no better position than the debtor, and thus he is postponed to a prior equitable assignee of the debt, even in the absence of notice. The H Co. argued that consideration was necessary to render such an assignment valid, and relied on *Wigan* v. *England and Scottish Law Life Assurance Association* [1909] Ch. 291, and *Glegg* v. *Bromley* [1912] 3 K. B. 474. Atkinson J. explained and distinguished these cases. He pointed out that in neither *Badeley* v. *Consolidated Bank* nor *Re General Horticultural Co.* was anything said about the

necessity for valuable consideration. It was laid down broadly that a garnishee order is postponed to any prior equitable interest, without any suggestion of a possible limitation of this proposition. He accordingly held that consideration is not essential to the validity of an equitable assignment.

W. E. C.

[A recent valuable article on the topic is Mr. R. E. Megarry's ' Consideration and equitable assignments of legal choses in action,' 59 L. Q. R. (Jan. 1943), 58—62.—Ed.]

TORT—MASTER AND SERVANT—NEGLIGENCE—EXPRESS PROHIBITION—EMPLOYER LIABLE.

Canadian Pacific Railway Co. v. *Lockhart.* [1942] A. C. 591.

A servant of the appellant Company, employed as a carpenter, was required to make a journey in the course of his employment. In disregard of written notices prohibiting employees from using privately owned motor-cars for the purpose of the Company's business unless adequately insured, he used his own car which was uninsured, and, by negligent driving, injured L. The Judicial Committee held that the Company was liable to L.

Following Lord Phillimore in *Goh Choon Seng* v. *Lee Kim Soo* [1925] A. C. 550, 554, their Lordships distinguished cases where (1) the servant was using his master's vehicles for his own purposes: then the master is not responsible. The present case did not fall under this head; the fact that the use of his own motor-car for the journey might be the more convenient means of transport for the servant did not ' alter the fact that he was performing the journey for the purpose of, and as a means of execution of, the work he was employed to do ' (p. 600); (2) the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment: again the master is not responsible. The Court said that if the prohibition had absolutely forbidden the servant to drive his motor-car in course of his employment, it might well have been maintained that he was employed to do carpentry work and not to drive a motor-car, and that, therefore, the driving of the motor-car was outside the scope of his employment (p. 601); (3) the servant is doing some work he is appointed to do, but does it in a way which his master has not authorised. In these cases the master is nevertheless responsible. The means of transport was incidental to the execution of what he was employed to do, and, the prohibition being restricted to the use of an uninsured car, the use of the car became an authorised act, but performed in an improper manner. It was, therefore, within the course of employment. The decision follows *Limpus* v. *London General Omnibus Co.* (1862) 1 H. & C. 526, and *Lloyd* v. *Grace Smith & Co.* [1912] A. C. 716. But it may well be urged on the authority of these cases that the act would still be within the scope of employment even though the prohibition extended to cars in general, provided he went direct and did not go off on a frolic of his own. This, however, does not appear to be the law. It would seem that in this respect the case imposes a limitation on the ' frolic of his own ' principle.

L. J. D.

[*Lockhart's Case* was followed by Hilbery J. in *McKean* v. *Raynor Bros., Ltd.* [1942] 1 All E. R. 650.—Ed.]

TORT—MASTER AND SERVANT—TRANSFER OF EMPLOYEE'S SERVICES—EMPLOYEE DELIVERING PETROL—SMOKING—LIGHTED MATCH THROWN ON FLOOR—EXPLOSION—HELD NEGLIGENCE IN COURSE OF EMPLOYMENT.

Century Insurance Co., Ltd. v. *Northern Ireland Transport Board.* [1942] A. C. 509.

The respondents, under a contract with a petroleum company for the delivery of petrol in lorries, agreed that its employees should accept the orders of the petroleum company, 'regarding such delivery, the payment of accounts and all matters incident thereto.' X, the driver of a lorry, being used to deliver petrol under the contract, while transferring petrol from the lorry to an underground tank, struck a match to light a cigarette. He then threw the lighted match down, thereby igniting petrol, the fire from which caused an explosion. Now the petroleum company had, in accordance with their contract, insured the respondents against liability for damage to the property of third parties caused by lorries while being used by the respondents. The policy was taken out with the appellants, who, when asked to make good damage caused by the explosion, denied liability under the insurance policy contending (1) that X was a servant of the petroleum company and not of the respondents when the explosion occurred, and (2) that in any case the negligent act which caused the explosion was not done in the course of X's employment.

The House of Lords unanimously rejected these pleas, and decided that the appellants were liable.

Regarding the first plea, Viscount Simon L.C. (at p. 513) approved the dictum of Bowen L.J. that, 'by the employer is meant the person who has a right at the moment to control the doing of the act.' He also quoted (*ibid.*) Bowen L.J. in *Moore* v. *Palmer* (1886) 2 T. L. R., 781, 782, that 'the great test was this, whether the servant was transferred, or only the use and benefit of his work.' Lord Wright (at p. 516) regarded this as a more satisfactory test than the reference to 'control.'

Regarding the second plea, the Court held that X's negligence was not mere collateral negligence contemporaneous with his employment: it was negligence in the performance of work he was employed to do. 'I think what plausibility the contrary argument might seem to possess,' said Lord Wright (at p. 519), 'results from treating the act of lighting the cigarette in abstraction from the circumstances as a separate act.'

Williams v. *Jones* (1865) 3 H. & C. 602, was considered and the judgments of the dissenting minority preferred. *Jefferson* v. *Derbyshire Farmers, Ltd.* [1921] 2 K. B. 281, was followed.

This case has made clearer what acts should be considered as done by a servant in the course of his employment. The somewhat anomalous decision in *Williams* v. *Jones* has been discredited. Acts done by a servant are within the scope of his employment if they are incidental to what he is employed to do.

D. H.

TORT—NEGLIGENCE OF RADIOGRAPHER IN PROFESSIONAL DUTIES—LIABILITY OF HOSPITAL AS EMPLOYER.

Gold v. *Essex C.C.* [1942] 2 K. B. 293.

G, the plaintiff, was treated by a radiographer in the employ of the respondents at one of their county hospitals. By reason of his failure to provide adequate screening material in giving Grenz-ray treatment, G suffered injury to her face. The radiographer was proved to be fully competent to administer the treatment given.

The Court of Appeal reversed the decision of Tucker J. ([1942] 1 All E. R. 326) and held that, as the radiographer was under a contract of service with the respondents they were liable for his negligence. Furthermore, a local authority, exercising its powers under the Public Health Act, 1936, ss. 181, 184 was held to undertake an obligation to treat and was accordingly liable if the persons employed to perform its obligation acted without due care; but the Court preferred to rest its decision on the broader ground of negligence at Common Law.

Although Tucker J. had felt himself bound by the decision in *Hillyer* v. *St. Bartholomew's Hospital* [1909] 2 K. B. 820 to place the radiographer in the same position as the nurse in the operating theatre the Court of Appeal felt themselves free to examine that case and discover exactly what had been decided. They accepted the narrower judgment of Farwell L.J. in *Hillyer's Case* as presenting sounder reasons for the decision there than the ground given by Kennedy L.J. that the only duty of a public hospital towards the patient is that he shall be treated by experts of whose competence the hospital governors have taken reasonable care to assure themselves and that those experts shall have fit and proper appliances. In *Gold's Case* the Court of Appeal applied the legal principle that the rule of 'respondeat superior' applies to negligence in any work for which the servant is employed irrespective of his employer's capability to do that work and even when the servant is under the orders of an independent third party unless the damage suffered is due mainly to the negligence of that third party. The respondents had undertaken to give treatment and through their servant's negligence, they had failed to carry out that obligation.

This case is of particular interest for its critical examination of the judgments in *Hillyer's Case* and its conclusion that the wider judgment of Kennedy L.J. was inconsistent with the ordinary legal principles of a master's vicarious liability.

B. H. W.

TORT—NEGLIGENCE—NERVOUS SHOCK—HELD NO DUTY ON DEFENDANT TO TAKE CARE BECAUSE SHOCK WAS NOT REASONABLY TO BE ANTICIPATED.

Hay or *Bourhill* v. *Young*. [1943] A. C. 92.

B was a passenger on a tramcar from which she alighted some fifty feet from the junction of the road along which the tram was travelling and a cross road. While she was being helped to place her heavy fishbasket on her back, a motor cyclist collided with a motor car turning into the cross road and was killed. B saw nothing of the accident, but merely heard the noise of the impact of the two vehicles. After the body of the motor cyclist had been removed, she approached the spot and saw blood on the road. In consequence, B was alleged to have injured her back by being startled by the noise of the collision, and to have sustained a severe nervous shock, though she was in no reasonable fear of immediate bodily injury to herself. She was about eight months pregnant at the time and gave birth to a still-born child five weeks later. B sued the representatives of the motor cyclist, who was admittedly negligent as against the driver of the car, but the question was whether he owed any duty to B in that he ought, as a reasonable man, to have contemplated the likelihood of the injury to her in the circumstances.

Held, by the House of Lords, the action was not maintainable. The House regarded the question to be decided as one of liability and not one of remoteness of damage. As the motor cyclist could not reasonably have foreseen that B, placed as she was, would be affected by his negligent act he owed no duty of care towards her. While, on the facts of this case, the decision arrived at seems the right one the reasoning employed would appear to leave the law still more involved than

before. The ' reasonable foresight ' test appears to be more satisfactory than the test of ' direct consequence ' for deciding questions of liability, especially in nervous shock cases and although it was not here applied the judgments have cast doubt upon hitherto accepted decisions based upon the former test. As nervous shock cases must depend largely upon their particular circumstances, it might have been better to distinguish (as Lord Porter in fact did) this case on the facts from *Hambrook* v. *Stokes Brothers* [1925] 1 K. B. 141, without expressing a preference for the dissenting judgment in that case (as did Lord Russell of Killowen, *obiter*). *Owens* v. *Liverpool Corporation* [1939] 1 K. B. 394 may presumably now be regarded as bad law (Lords Thankerton, Wright and Porter, *obiter*).

O. R. W. W. L.

TORT—RULE IN RYLANDS *v.* FLETCHER—FLOODING FROM SPRINKLER SYSTEM—DAMAGE TO LOWER PART OF SAME BUILDING—KNOWLEDGE OF IMPLIED CONSENT.

Peters v. *Prince of Wales Theatre (Birmingham), Ltd.* [1942] 2 All E. R. 533.

A took a lease from B of a shop with store rooms over it, which were in the same building as the Prince of Wales Theatre, also owned by B. When the lease was granted, parts of the building, including A's shop, were fitted with a sprinkler system as a protection against fire. In the thaw after a severe frost A's stock was flooded and severely damaged. It was found that there was no negligence on the part of B and that A knew of the installation when he took his lease. On these two considerations the Court of Appeal held that B was not liable, since if the tenant knew of the installation he must be taken to have given his consent to its presence, and therefore the case was not within the principle of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330.

The Court stated that the fact that such an installation was ordinary and usual in a building which included a theatre was not the decisive feature of the case. But it may be urged that it ought to have been decisive, for even if such a system was extraordinary and unusual, it would be from the fact that the tenant, as much as his lessors, stood to benefit from the installation that the tenant's consent to it could be implied. But the Court rejected the argument of common benefit, and preferred to base their decision on the implied consent of the tenant. In so doing, they pushed into the background an alternative ground for decision, that the tenant must take the premises as he finds them. As this was in general the *ratio decidendi* of the precedents for the present decision, from *Carstairs* v. *Taylor* (1871) L. R. 6 Exch. 217 to *Rickards* v. *Lothian* [1913] A. C. 263, the effect of making implied consent the basis of the decision is to make the old basis—that the tenant must take the premises as he finds them—merely evidence of the tenant's implied consent.

It was not raised as a defence that the frost was an act of God; but if it had been raised, the frost was so heavy that the appellant might have been under no liability under *Nichols* v. *Marsland* (1876) 2 Ex. D. 1, supposing that a frost of 22° could be considered a frost of such magnitude that it could not reasonably have been anticipated.

It appears also that if such a system were installed after the commencement of the lease, consent to it would have to be express, since the consent on which the decision rests is implied from the taking of the lease.

S. L. W.

WILL—COMMORIENTES—WILL OF HUSBAND IN FAVOUR OF WIFE—DEATH OF HUSBAND AND WIFE IN AIR RAID—EVIDENCE GIVEN BY WITNESSES WHO SAW THE BODIES AFTER DEATH THAT DEATHS WERE SIMULTANEOUS HELD INSUFFICIENT TO REBUT THE PRESUMPTION UNDER LAW OF PROPERTY ACT, 1925, S. 184.

Re Lindop, Lee-Barber v. *Reynolds.* [1942] Ch. 377.

A house was demolished by an explosive bomb in an enemy air raid, and the bodies of L and his wife who had been asleep in the same bedroom were found on the ground floor underneath their bedroom suffering from multiple injuries. The evidence showed that they must have been instantly killed, and the two witnesses who found and examined the bodies were of the opinion that the deaths must have been simultaneous. The question was which of the two died first in order to determine the destination of L's estate.

In his judgment, Bennett J. observed that before the Law of Property Act, s. 184, on evidence such as that submitted, the deceased would be presumed to have died simultaneously, on the authority of *Wing* v. *Angrave* (1860) 8 H. L. C. 183, where it was held that there was no common law presumption of survivorship in such a case. Now, however, there is a statutory presumption that the younger survived, but evidence may be forthcoming to rebut the presumption. In this case the evidence adduced was said to prove not that L survived his wife but that they died simultaneously. In *Underwood* v. *Wing* (1855) 4 De G. M. & G., 660, Lord Cranworth observed upon the improbability of two persons dying at exactly the same moment, and that to adjudicate on that principle would be proceeding on false *data*. In *Re Lindop* the evidence did not rebut the statutory presumption and it must be presumed that Mr. Lindop died first. Little can be said about this case since the decision is a perfectly reasonable one on the facts as proved. The only point in question was whether the deceased could have died simultaneously, and since Lord Cranworth rejected this idea as a physical impossibility it is a clear case of the statute applying. Considering the case from the natural rather than the legal point of view it was a good decision, since if they had lived to die at a ripe old age the wife would probably have survived her husband, being many years the younger.

E. S.

BOOK REVIEWS

The Pollock-Holmes Letters : Correspondence of Sir Frederick Pollock and Mr. Justice Holmes, 1874—1932. Edited by M. De Wolfe Howe, Professor of Law, University of Buffalo School of Law. With an Introduction by Sir John Pollock, Bart. Cambridge: University Press. 1942. Two Vols. xxiii, 275 and 359 pp. (36*s.* net.)

Writing to Sir Frederick Pollock in March, 1921, in acknowledgment of a telegram of congratulation on the attainment of his eightieth birthday, Mr. Justice Holmes says ' one of the greatest abiding happinesses of my life is your friendship, as you know.' A correspondence, which had commenced in the year 1874 and was confined at first to legal investigations in which the writers were mutually interested, had developed in the course of years into an intimate friendship and a regular interchange of news of personal activities and of ideas on topics of intellectual interest to the writers or suggested by current events. Naturally, matters affecting the study and administration of the law continued to hold a prominent place in the correspondence, as clearly appears from the careful apparatus supplied by the editor in the form of an exhaustive Index and a Table of Cases extending to six pages, but, as time went on, events and persons interesting to the writers and a wide field of modern and classical literature are regularly discussed or criticised, so that the material in the later correspondence may well repay the attention even of those who, like Theodore Roosevelt (according to the evidence of a member of the Senate), do not ' care a damn for the law.'

These volumes will therefore be found a mine of information on many things for which we might look in vain elsewhere. Thus, we often hear the question asked, what were the respective contributions of Sir Frederick Pollock and Professor Maitland to the great History of English Law which, since 1895, has dominated the study of English Law in its historical aspects? The answer is to be found in a letter from Pollock to Holmes, dated 23rd August, 1895 (Vol. I, pp. 60-1).

In view of the extensive damage to the other Inns of Court in recent air-raids, the letter of 2nd January, 1918, which gives an account of the attack on Lincoln's Inn in December, 1917, will always be of some historical importance.

' I have been almost under fire in the basement of Lincoln's Inn.

' The last air-raid, 18th December, surprised the Benchers just sitting down to dinner. A high explosive bomb fell in Stone Buildings, fortunately in the open, and did little damage beyond smashing glass. Ultimately we drank the King's health after the "all clear" sounded and so departed with content ' (Vol. II, p. 263). The phrasing at the end is evidently modelled on Pepys.

Neither of the writers is much impressed by modern attempts to construct systems of Jurisprudence. Pollock has ' no doubt that the late Prof. Hohfeld was a learned and ingenious man, and he seems to have at least the merit of not inventing new words,' but evidently is of opinion that it is useless to attempt ' to reduce ultimate truths to the patterns on a blackboard.' Holmes thinks ' all those systematic schematisms rather bores.' The latter, in noticing the first volume of Vinogradoff's Outlines of Historical Jurisprudence, delivers himself as follows: ' I took another flying glimpse at your man, Vinogradoff's, new book. It gave me the impression of the Chinaman who ran three miles to jump over a hill—but I just looked, yawned and passed on ' (Vol. II, p. 64).

Pollock's low opinion of Austin's work is expressed in no uncertain terms. ' The damnable heresies of Austin ' (Vol. I, p. 71). ' The truth is that his law is thoroughly amateurish ' (Vol. I, p. 94). ' Austin—that clever but very narrow and grossly

overrated dialectician.' 'One reason for his success in English law schools may be that a cocksure dogmatic theory, however bad, is good stuff to examine, and cram for examinations, upon' (Vol. II, p. 263).

The very useful Introduction by Sir John Pollock should be read before proceeding to the Letters, as it throws much light on the characters of the writers and particularly of Mr. Justice Holmes in his social aspect.

D. T. O.

Sir John Fortescue, *De Laudibus Legum Angliae.* Latin text, with Translation, Introduction and Notes by S. B. Chrimes, M.A., Ph.D., Lecturer in Constitutional History in the University of Glasgow. Published by the Cambridge University Press in the series of Cambridge Studies in English Legal History, with a General Preface by the Editor of the series, Harold Dexter Hazeltine, Litt.D., F.B.A. cviii and 235 pp. (25*s.* net.)

All law students who have latent in them a spark of interest in the great figures of the common law will owe gratitude to Dr. Chrimes for his labour of love in editing and translating Sir John Fortescue's *De Laudibus Legum Angliae*, and to Professor Hazeltine and the University Press for including the book in the series of Cambridge Studies in English Legal History. The editor's qualifications for his task are unexceptionable, for he had already won a place among the acknowledged experts in the political and constitutional thought of the fifteenth century by his earlier volume of *Studies*, based upon his work as a research student in the University under the direction of Mr. Gaillard Lapsley.

Dr. Chrimes has reduced to commendable brevity the editorial matter, giving information about the manuscripts, about earlier editions and translations, and about Fortescue's long and eventful life. In addition to his concise and readable account of the latter he has conveniently set out its chronological details in tabular form. In his section entitled '*Estimates and Conclusions*,' after quoting Holdsworth's statement that *De Laudibus* was the first book about English law and the English legal profession written by a lawyer expressly for the benefit of his unlearned brethren, he adds that it was the first deliberate attempt at an essay in comparative jurisprudence. The words 'deliberate attempt' are perhaps somewhat misleading, for they suggest more conscious aims than Fortescue is likely to have entertained. But they are qualified by the next sentence:—'Fortescue's comparisons may not be very profound, but they represent the beginnings of a less insular interest on the part of the common lawyers and foreshadow the rise of a new school of juristic thought.' Professor Hazeltine concurs, writing in his *General Preface* that 'comparison is in truth the *leitmotif* of nearly all Fortescue's contributions to learning.' This general preface, a substantial essay full of erudite allusion, ranges over a wide field. It will be found very helpful by those who seek to relate Fortescue to earlier and later legal thought.

But it is not researchers in the field of comparative legal institutions who are most benefited by a new translation of *De Laudibus*. When there exists material suitable for enabling an ordinary law student to learn about a great lawyer from his own writings, and about legal institutions from contemporary sources, it is not very creditable to our national scholarship that the material should not be available. The most popular parts of *De Laudibus* have, it is true, been included in the *Readings* of Professors Pound and Plucknett, but this book is, unfortunately, not as well known in this country as it ought to be. Students ought now to be able to read in any law library Fortescue's graphic account of trial by jury and of the inns of court. Some, too, may be interested in what Fortescue has to say about the French use of torture for obtaining evidence. It is startling that an English judge

should have written as he did about 1470, and that three hundred years later the French authorities should still have been regarding the use of torture with complacency.

Fortescue must have been a man of quite outstanding vigour. He was certainly over seventy, and perhaps over eighty, when he wrote. And in his later years he had suffered severe hardship. But the pages written by so old and so faithful a servant for the guidance of his boy prince suggest not weariness or cynicism, but vitality and enthusiasm. And many a reader will feel that he has made contact over the centuries with a man who, whatever his merits as a lawyer,—his reputation has in fact always stood high—was a very great Englishman.

H. A. H.

The Principles of Contract. By Sir Frederick Pollock. Eleventh Edition by P. H. Winfield, F.B.A., LL.D., Professor of English Law in the University of Cambridge and Honorary Bencher, and Barrister-at-Law, of the Inner Temple. London: Stevens & Sons, Ltd. 1942. xxxii and 603 pp. (32*s.* 6*d.*)

In his tribute to Sir Frederick Pollock written shortly after his death, Lord Wright declared that he had vindicated to this generation the vital importance of extra-judicial writing in law. Although one of the earliest of his works, the *Principles of Contract* remains a legal classic. It was first published in 1876, three years before Anson's equally famous text-book on the same subject. Between them these two works have contributed greatly to the study and development of the law of contract. In a sense they were complementary, for while Anson's object was to provide a treatise suitable for beginners, Pollock's work was more suited for the advanced student for whom it has been indispensable.

A legal text-book soon ceases to be up to date. When this occurs it fails to provide a true and full account of the living law, and the reader can never be sure that he is not stepping into a concealed trap. If a work such as Pollock's *Contract* is to retain its full usefulness after the author's death, steps must be taken to inform the reader of subsequent developments in the law and literature of the subject.

No one could be better qualified to undertake this task than Professor Winfield. He, too, is an acknowledged master of the Common Law, whose works are frequently cited and quoted by the Courts, and he combines with his great learning a facility of expression which has always delighted his pupils and his readers.

Recent judicial decisions and changes in legal thought have called for some important new passages by the editor. One of these deals with the question of certainty of terms, which has been the subject of several well-known cases which did not appear in the previous edition. Dr. Winfield considers that the test for ascertaining whether or not an agreement is sufficiently definite to constitute a contract has been best stated by Lord Wright in *Hillas & Co., Ltd.* v. *Arcos, Ltd.*, and that to ask for a more exact criterion is perilously near a demand for the mechanisation of all business contracts.

The doctrine of public policy, the history of which Dr. Winfield has fully dealt with in the Harvard Law Review, is the subject of another note. He is of the opinion that notwithstanding anything that was said in *Fender* v. *St. John-Mildmay* it cannot be disregarded as an agency in the development of the law for 'however ripe a system may be, it must of necessity change with the changing needs of the community.'

No topic in the law of contract has received so much attention from legal writers since the beginning of this century as Frustration. After analysing the various theories which have been advanced on the subject, Dr. Winfield concludes that the balance of judicial authority seems to be in favour of the 'implied term'

theory. He himself, however, would suggest a slightly different method of approach and would ask in each case whether any reasonable third party would consider the effect of the supervening circumstances as altering the obligation of one or both parties to such an extent as to make the contract no longer capable of being enforced. Calling in the 'reasonable third party' would certainly help to avoid what Pollock called 'fine drawn distinctions of a kind not desirable in matters of business,' while making the law sufficiently flexible in its application.

These are some of the most noteworthy contributions to the new edition, but equally welcome are the numerous minor annotations to be found throughout the whole work which refer the reader to additional authority or to another point of view which he should consult.

Professor Winfield has preserved Pollock's text intact, and his own additions are separately marked. Possibly a departure from this rule would have been permissible in the section which deals with the contractual capacity of married women. When the Law Reform (Married Women and Tortfeasors) Act, 1935, was passed, the tenth edition was already in type, with the result that that section was admittedly transitional, and would no doubt have been re-written by Pollock had he lived to do so. When the time comes for the twelfth edition, it might be an advantage if Dr. Winfield would set out the present law in a new section of his own, and retain Pollock's account of the pre-1935 law as given in the ninth edition before the passing of the Act.

D. J. Ll. D.

Annual Digest and Reports of Public International Law Cases: Years 1938—1940. Edited by H. Lauterpacht, M.A., LL.D., Whewell Professor of International Law, Cambridge; of Gray's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. 1942. xxxiv and 607 pp. (55*s.*)

Any reader of the issues of the *Digest* will realise the difficulties which its learned editor must encounter in collecting his material during the present war, but we in particular have first-hand knowledge of the arduous work that has been needed on his part and on the part of his collaborators. We wish to express our admiration of the skill with which the difficulties have, so far as is humanly possible, been overcome, and to proffer our congratulations on the result. The time-lag between the rendering of a decision and its appearance in the *Digest* has been greatly reduced, and the editor has steadily progressed with his plan of making the volumes include actual reports of the decisions rather than digests of them. This volume, as he points out, is of especial interest in view of its inclusion of cases arising out of the Spanish Civil War, the Italian Conquest of Abyssinia and Nazi legislation and practices (he might well have said 'malpractices') in Germany. He adds that cases on international administration and organisation are lacking because of the present unhealthy state of international society; and that 'it is impossible to conceive of a true society of States under the reign of law so long as the obligatory jurisdiction of international tribunals has not become a normal and, indeed, self-evident principle of the international system.' That is true enough, but we have a long and rough road to travel before states show the same law-abiding spirit towards International Law as their citizens exhibit towards their own national law. We have still to convince the citizens of some states that gangsterism on the part of their rulers does not pay, and that is what the Allied Powers are doing now. But even more important than this negative aim is the positive one of convincing men of all nations that there is a tribunal in existence which will give 'a square deal' to their own particular nation in any dispute on a matter of international politics and not merely on a matter of International Law.

P. H. W.

Concerning English Administrative Law. By Sir Cecil Thomas Carr. London: Humphrey Milford, Oxford University Press. 1941. ix and 189 pp. (10*s.* 6*d.* net.)

This book reproduces six lectures delivered in 1940 in Columbia University on the Carpentier foundation. It ought to be read by every student of constitutional law and by every civil servant of the higher grade, and its easy style and lucidity of thought should make it attractive to any layman. Sir Cecil Carr speaks with the intimate knowledge of a great expert on the topic and with a full and sympathetic appreciation of all the arguments for and against administrative law; his balanced and careful judgments on these arguments make the book all the more valuable because during the last two generations we have been passing through a transitional period from what may be called Dicey's point of view of administrative law as an almost unqualified evil to the view that, be its dangers what they may, government at the present day, whether in peace or war, is impossible without it. As Sir Cecil says (p. 37), its justifications are the limit of the time of the legislature, the limit of its aptitude and the need of some weapon for coping with emergencies whether they arise in time of peace or in time of war. In 1921, he postulated five safeguards against abuses of power by those who formulate administrative law and he reviews them at pp. 49—64. It is gratifying to see that they need practically no revision. As to officials who carry out this branch of the law, the chapter on Bureaucracy ought to be studied both by them and by their critics. The vexed question of limits on the jurisdiction of administrative tribunals is admirably handled in Chapter 4, and 'Crisis Legislation' in Chapter 3. Sir Cecil admits that if hard cases make bad law, emergencies may make worse, but he gives forcible reasons for his denial that the war-time powers conferred on the executive mark the negation and bankruptcy of democratic liberty. In this connection we would call attention to Sir Cecil's later article in 42 Columbia Law Review (1942), 339—355, which discusses the *Liversidge Case* and other recent decisions.

Stated in very broad terms, our own humble conclusion is that the requisites of success in administrative law are, first, fairness, competence and tact on the part of those charged with making it and giving effect to it, and, secondly, convincing the public that the first requisite is in fact fulfilled to such a degree as can be reasonably expected of any human institution.

P. H. W.

A Discourse upon the Exposicion and Understandinge of Statutes. Edited from Manuscripts in the Huntington Library by Samuel E. Thorne, North-Western University School of Law, San Marino, California. Huntington Library. 1942. vii and 194 pp. ($5.) (English price, 33*s.* 6*d.* net.)

More than half of this book consists of the author's Introduction and it is of the highest value in its exposition of the slow growth of ideas about the authority and scope of English statutes. It forms the necessary historical perspective for true appreciation of the picture of interpretation represented by the 'Discourse' itself. Professor Thorne has probed the Year Books deeply as well as many other authorities, and his editing of the text of the Discourse impresses us as a very scholarly and thorough piece of work. The tract was written before 1571 and perhaps before 1567 by an unknown author and is here printed for the first time. The authority of early statutes, says Professor Thorne, was regarded very differently from what it is now. 'Statutes were regarded in the Courts as essentially isolated rulings, supplementing or modifying the common law, enacted to aid the judiciary in deciding the questions of *meum et tuum* that pressed for solution' (p. 9). It

was only towards the end of Henry VIII's reign that modern notions began to develop and the Discourse marks perhaps the earliest attempt to grapple with the problem of administering justice consistently with the preservation of the supremacy of Parliamentary legisaltion. That problem was perceived only in misty fashion in the period of the Discourse but it was destined to present itself much more sharply in the seventeenth century. In this tract one can see the germs and saplings of several of the rules of interpretation that we know in their full growth. One homely metaphor is worth quoting. Penal laws are strictly construed, ' for the lawe alwaies favoureth hym that goeth to wracke, nor it will not pulle him on his nose that is on his knees ' (p. 155).

P. H. W.

Spartan Education. By Edward H. Warren. Boston: Houghton Mifflin Co. 1942. xii and 164 pp.

The learned author tells us in a letter accompanying this book that the edition is limited to 1,000 copies, that orders in excess of that number were received within a few days of publication and that therefore the book is not for sale. This is very regrettable, for it is an attractive and valuable volume. It includes not only several papers connected with legal education but also articles contributed to newspapers and writings on half a dozen topics in a chapter labelled ' Miscellany,' the most notable of these latter being a reprint of an article on Serjeants-at-law.

Professor Warren says, ' I shall be seventy next January [1943] . . . My life has been many-sided. I should like to be remembered as a tutor.' He need never fear that he will be forgotten as a teacher in either his oral instruction or in his writings, and all who have had the privilege of knowing him will always think of him as a profound lawyer, a very versatile man, a charming companion and a great American citizen. Before the United States entered this war he had a remarkable clarity of vision on the position of his country. It is set forth in the article, ' We shall win.' While he freely acknowledges Mr. Willkie's undiluted vigorous patriotism, he says of those who voted for him, ' Many of his supporters were, I fully realise, of the salt of the earth, *but* many of his supporters were of the pepper of Hell.'

It is natural for a fellow-teacher of law to pick out the chapter on ' Effective teaching methods ' as the gem of this collection. We should like to put it in the hands of every young man or woman who contemplates teaching of the law as a profession. It embodies all the standards that for many years the reviewer, however imperfectly has himself sought to attain, and every word of it is good. ' Put classroom discussions in the centre of the stage,' is one of Professor Warren's leading principles, although he concedes that the formal lecture may have its uses. In another chapter (at p. 60) he says, ' I have consciously sought to fashion all my Faculty activities on a model which was a composite of Ames and Gray and Thayer.' These were great men in the Harvard Law School, and their shades might well recognise Professor Warren not only as a faithful disciple of theirs but also as the creator of a new model.

P. H. W.

Rayden's Practice and Law in the Divorce Division. Fourth Edition. Consulting Editors: NOEL MIDDLETON, K.C., of Gray's Inn, and C. T. A. WILKINSON, Registrar of the Probate and Divorce Division. Editors: J. F. COMPTON MILLER, of the Inner Temple, Barrister-at-Law, and F. C. OTTWAY, of the Probate and Divorce Registry. London: Butterworth & Co. (Publishers), Ltd. 1942. cxxviii and 781 and 116 pp. (£3 7*s.* 6*d.*)

This work is so pre-eminently a practitioner's book that it is only a practitioner who could competently review it. Unfortunately we received it rather too late to enable us to secure any expert in divorce procedure to undertake the task. Nevertheless, inadequate as any notice of our own must be, we have decided to write a very brief one in preference to holding over the book until next year in the hope of getting it properly reviewed, for it is important that lawyers in general should know the leading changes that have been made in this edition. The chief alterations are due to the Matrimonial Causes Act, 1937, and the Rules issued upon it; and to the effects of new Income Tax law. Account has, of course, been taken of the numerous decisions in divorce jurisdiction since the last edition (1932). For the present edition, there is a completely new team of editors and consulting editors, but, as in the last edition, all are experts in the law of divorce. We cannot imagine a more complete, accurate and convenient guide to the practice of the Court.

P. H. W.

The International Economic Law of Belligerent Occupation. By ERNST H. FEILCHENFELD. Monograph Series of the Carnegie Endowment of International Peace, Division of International Law, No. 6. Washington: Columbia University Press. 1942. xii and 181 pp. ($1.50.)

This is an important contribution to the study of the law of belligerent occupation in time of war and during an armistice. The subject has received scant treatment during the period between the two world wars in spite of the great changes in the sphere of governmental activities in matters of private law. The present book is a detailed commentary on the relevant Hague Regulations, but its scope exceeds the narrow limits of the conventional law. Restricting himself to the economic law of belligerent occupation, the author studies a branch of international law which has hitherto been dealt with only in outline by the Hague Conventions while its modern aspects have escaped the attention of the experts on the law of belligerent occupation. Such neglected aspects, to mention only a few, include the power of the occupant to control production, distribution, consumption and labour, to regulate currency, and banking as well as debt problems. The growing tendency in many countries towards greater interference in the economic sphere has profoundly affected the modern conception of the respect for private property as compared with that envisaged by the Hague Conventions. By assuming such powers, the occupant may become enabled to effect the ruination and spoliation of the occupied territories. Conversely, the law prevailing in totalitarian countries is frequently to such an extent in conflict with the general standards maintained by the allies, as to render the respect for such rules incompatible with an allied occupation. It is impossible within the limits of this review to examine the results arrived at by the author. At times one would wish to see his own point of view stated more clearly. Also it is to be regretted that he was unable to consider the practices prevailing in the present war. But, as the author points out, circum-

stances necessitated an early publication in disregard of possible shortcomings. The book is a valuable addition to the literature of international law and must be studied by all those who are brought into contact with the theory and practice of the law of occupation.

K. L.

The Conference of Ambassadors (*Paris*, 1920—1931). By GERHARD P. PINK. Geneva Studies, Vol. XII, Nos. 4—5. 1942. 293 pp.

This is a competent and instructive piece of research covering a crucial period of international relations. The author will probably be the first to admit that the Conference of Ambassadors of Great Britain, France, Italy and Japan set up by a Resolution of the Supreme Council of the Allied and Associated Powers in December, 1919, was not a significant experiment in international administration. It was a political body, with an ill-defined jurisdiction, created to deal with questions of detail arising out of the Peace Settlement; large questions of policy were left for direct communication between the Allied Powers. It was concerned with the approval of the constitutions of Danzig and Memel; with the determination of boundaries; with the supervision of commissions of military control; and with miscellaneous tasks specially entrusted to it from time to time. Of these the sad record of the Conference in the settlement of the Janina-Corfu affair stands out as an instance of short-sighted opportunism which thrust the thin edge of disintegration into the edifice of the League. It is no disparagement of the conscientious work of the author to say that for the purposes of the liquidation of the second World War the lessons to be derived from the activities of the Conference of Ambassadors are negative rather than positive. They show what must be avoided, not what is to be done.

H. L.

Criminal Youth and the Borstal System. By WILLIAM HEALY, M.D., and BENEDICT S. ALPEN. New York: The Commonwealth Fund; London: Humphrey Milford, Oxford University Press. 1941. vi and 251 pp. ($1.50.)

The interest which is taken in the U.S.A. in the study of criminal science is well exemplified by this book, the best which has so far appeared on our Borstal System. This will cause no surprise to those who have any knowledge of Dr. Healy's work in this science. Dr. Healy was one of the first to recognise the merits of this English experiment in training youthful offenders, and in 1929 came to England in order personally to observe its working. The subsequent report which Dr. Healy prepared led to the incorporation of certain of his recommendations in the draft of the model Youth Correction Authority Act, adopted by the American Law Institute in 1940. More details however being desired, funds were provided in the U.S.A. for an intensive study of the Borstal System and the authors came again to England in 1939 to continue their investigations. In seventeen chapters this book gives the whole picture of the Borstal System, showing its origin, development, machinery and effects. But the book does more than this, for it indicates certain directions in which improvements can be made and the steps which should be taken to that end. None the less the following quotation shows the high praise which a great criminal scientist holds to be due to this English achievement. '. . . . the Borstal figures show the largest measure of favourable results from reformative treatment that appear validly established anywhere.'

J. W. C. T.

Voltaire and Beccaria as Reformers of Criminal Law. By Marcello T. Maestro. New York: Columbia University Press. 1942. x and 177 pp. (13*s.* 6*d.* net.)

This excellent book is intended as a systematic and critical study not only of the part played by Voltaire and by Beccaria in promoting the reform of criminal law, but also as an estimate of Beccaria's influence on Voltaire's attitude to that law. The conclusion reached is that Voltaire's evolution in this matter was primarily due to Beccaria's influence, while without their joint contributions the criminal reforms of the eighteenth century might have been indefinitely postponed. This may well be true of continental criminal law, but Beccaria's work influenced also thinkers in England; for instance, it affected Blackstone's work. This, however, adds to the importance of the present study, which will be found a most valuable help to those who desire to investigate the rise and spread of basic principles of criminal justice. The author's style is clear and concise, his argument is well presented, and there is an admirable bibliography to which however Professor Coleman Phillipson's book (Three Criminal Law Reformers, Beccaria Bentham, Romilly, 1923) should be added.

J. W. C. T.

Sociology of Law. By Georges Gurvitch, Ph.V., LL.D., D. ès L. With a Preface by Roscoe Pound. New York: Philosophical Library, Inc., and Alliance Book Corporation. xx and 309 pp. ($3.75 net.)

The author is one of the most eminent French sociologists, who is evidently deeply interested in the application of sociology to law; but he does not seem to be a trained lawyer, and this perhaps accounts for some of the inadequacies of his book to the legal mind. The dust-cover states that it is 'the first complete study of the problems of the sociology of law in all its aspects.' The reader whose interest has been stimulated by this claim should not be blamed if he scans with some impatience the author's introduction, lasting for sixty-seven pages, which sets out to justify the study of the sociology of law. If the reader has started with a doubt as to the existence or utility of this subject of study, he is not likely to be persuaded by this introduction to change his mind. In order to convince the sceptics, those who believe in the subject (and the remark does not apply only to the author of this book) must actually work in it and produce results. The unconvinced reader will therefore find with some disappointment that Chapter I, which lasts until p. 197, still does not give him any results obtained by the author, but is simply a historical review of 'The Forerunners and Founders of the Sociology of Law.' This is, however, a valuable and well-informed summary of work previously done in the field, from Aristotle onwards, by writers on jurisprudence, political philosophy, anthropology, criminology, and sociology generally.

This leaves the author with the remaining 112 pages in which to make his own study of the problems of the sociology of law. From the point of view of the lawyer (I do not presume to speak for the sociologist) the result must be said to be disappointing. The author does not discuss the actual working of any specific rules of law or legal institutions. He divides his subject into three parts. The first, which he calls the 'Systematic Sociology of Law (Microsociology of Law),' purports to discuss 'forms of sociality and kinds of law' and 'jural sociology as a description of depth-levels (the layers of law).' It is almost intolerably obscure, and much of it the reviewer found completely baffling. The second, 'Differential Sociology of Law,' is divided into two parts: the 'jural typology of particular groupings' and the 'legal typology of all-inclusive societies'; the latter part does

strike some responsive chords in the lawyer's mind. The scope of Part Three, the 'Genetic Sociology of Law,' can be explained by saying that it is somewhat reminiscent of Maine's *Ancient Law* and Pound's *Interpretations of Legal History*.

G. L. W.

Czechoslovak Yearbook of International Law. Edited by V. BENES, A. DRUCKER and E. TABORSKY. Published under the auspices of the Czechoslovak Branch of the International Law Association, 30, Norfolk Street, Strand, London. 1942. vii and 236 pp. (8*s*. 6*d*.)

This newcomer to the literature of international law contains contributions on different branches of international law with special reference to the status and the legal position of the allied nations, and more specifically, of Czechoslovakia.

Dr. E. Benes pleads for an international guarantee of human and civil rights. His plan involves a general recognition of individual rights in the international sphere entailing a corresponding limitation of national sovereignty and an adjustment of municipal systems of law so as to conform with international standards. Professor Brierly discusses the shortcomings of international law with special regard to the requirements of the post-war period. He holds that a perfection of the international machinery of justice is not sufficient, as States tend to demand satisfaction of their vital interests even if such claims cannot be sustained in law or in equity. The rule of law must be supplemented by the force of arms. The same problem is discussed in Professor Keeton's article on Legal Guarantees of Peace. Dr. Taborsky examines the question whether the Munich Agreement and the Vienna Arbitration are binding upon Czechoslovakia. Dr. Drucker discusses the validity of the legislation by the Allied Powers in Great Britain. His article must now be read in conjunction with the decisions of the Divisional Court in *Re Amand* (No. 1) and (No. 2) [1941] 2 K. B. 239; [1942] 1 K. B. 445. A cognate topic is the subject of Dr. Schwelb's well-documented essay on the Jurisdiction over the Members of the Allied Forces in Great Britain. War Crimes are the subject of Dr. Schwarzenberger's learned and constructive article. Other contributions include a lively essay by Professor Berriedale Keith on the Sanctity of Treaties, articles by Professor Cassin on the International Status of Czechoslovakia, and by Professor Prochazka on Czechoslovak Philosophy of Law. Dr. Vojacek, already known through his book, 'A Survey of the Principal National Patent Systems,' writes on Post-war Tasks of Patent Legislation, and Dr. Neustadt on Regional Understandings and Federalism. The remainder of the book consists of notes and book reviews.

K. L.

An Historical Introduction to English Law and its Institutions. Second Edition, Revised and Partly Rewritten. By Professor HAROLD POTTER, LL.D., Ph.D. London: Sweet & Maxwell, Ltd. 1943.

A second edition of Professor Potter's book will be welcomed by all students of English Legal History. This new edition, moreover, has been extensively revised and in some parts rewritten and readers will find much interesting new material not contained in the first edition. Of especial value is the increased emphasis in the Introduction which is laid upon some of the social and economic factors forming the background of legal development—factors which are all too often ignored or misunderstood by the lawyer. The new chapter on the Forms of Action is another valuable addition to the first edition, as is also the table illustrating the historical development of our Courts of law and the existing

hierarchy of Courts. This table should be of great assistance to the student who is beginning to study the complicated organisation of our present-day Courts and their still more complicated historical background.

It is perhaps to be regretted that the author has not been able to find space for a fuller treatment of the Courts exercising criminal jurisdiction both to-day and in the past. In particular, a more detailed account of the office of Justice of the Peace would be welcome, not only for its great historical interest but also because of the not inconsiderable volume of criticism now being directed against our Courts of Summary Jurisdiction.

Also, in the chapter on 'Some Sources of the Common Law,' which contains much useful material, it is rather disappointing not to find more detailed studies of some of the great writers on the Common Law. The influence of individual authors on the deveopment of our law has often been underestimated and, moreover, in the early stages of his work the law student, for whom this book is primarily intended, is always interested in the great personalities of our legal history and anxious to have of them an adequate picture.

But it is always easy (and perhaps unfair !) to discover inadequacies in any book covering such an enormous field of learning as the volume under review. In general, Professor Potter has undoubtedly contributed a volume of real and permanent importance to the study of our legal history. It is in many respects the best work contained in a single volume to which the law student can turn dealing, as it does, not only with the development of the English legal system but also with some of the rules of the Substantive law.

H. C. W.-T.

The Principles of Land Law under the Land Registration Act, 1925. By Professor Harold Potter. London: Sweet & Maxwell, Ltd. 1941. vii and 121 pp. (10*s*.)

Registered Conveyancing is very much the Cinderella of Real Property topics among academic writers and this is not the first time that Professor Potter has appeared in the rôle of its Fairy Godmother. With the present tendency to press for the extension of registration of title to the whole country, as exemplified in the recommendations of the Scott Committee in its Report on Land Utilisation in Rural Areas (Cmd. 6378, para. 238 (1942)), the subject is bound to find its way into the curriculum of all law schools. Some students' handbook will therefore be essential as the subject will demand more than the passing recognition given to it in Cheshire's *Modern Real Property* or the chapter in Burnett's *Conveyancing*, admirable though it is.

Professor Potter's book, as he states in the Prefatory Note, is substantially a reprint of Part I of the introductory treatise to Volume III of the fourteenth edition of *Key and Elphinstone's Precedents*, which is, of course, primarily a practitioner's book. Though the author 'confesses and avoids' the inherent disadvantages of this procedure, we think that they go deeper than he admits. Registered conveyancing is a complicated subject and a student's first text-book should concentrate on the principles, leaving the discussion of the details and practical difficulties, however important they may be, to more advanced treatises. No academic writer is so interested in the subject as Professor Potter and we hope that he will soon produce a book, written primarily for the student, as simple and elementary and indispensible as Hargreaves' *Introduction to the Land Law*. If he does he will fill a gap in existing legal literature.

The editing of the present volume leaves something to be desired. The date of a case is sometimes omitted when it does not form an integral part of the citation (see p. 38, note (*m*), and p. 82, note (*c*)), and this is all the more unfortunate when

the paper shortage has led to the omission of the Table of Cases. There are some unnecessary repetitions; thus within forty pages we are three times told that there is some foundation in the older authorities for a distinction between easements and incorporeal hereditaments, and three times referred to a note on p. 15 of *Goodeve and Potter*. A complete paragraph on p. 9 is reproduced with only slight verbal variations on p. 22. These are only surface blemishes which can easily—and should be—eradicated.

D. W. L.

Justice in Grey. By WILLIAM M. ROBINSON, Jr. Cambridge, Mass.: Harvard University Press; London: Humphrey Milford (Oxford University Press). 1941. xxi and 713 pp. ($7.50; 42*s*.)

This history of the judicial system of the Confederate States of America during the Civil War can only be described as a labour of love, so great are the industry and research which have been involved in its writing. The attitude of the victors was summed up by the Supreme Court of the United States in 1869 when it said of the Confederate Judiciary that it had been from the beginning a 'nullity, and could exercise no rightful jurisdiction' (*Hickman* v. *Jones*, 9 Wallace, 197). It is not therefore surprising that no immediate interest was taken in its history, and Mr. Robinson has been compelled to go to the Confederate State Papers, to the records of individual courts, to hitherto neglected manuscripts and to the newspapers of the period to get the material for this brilliant reconstruction of how the Confederate legal system was organised and operated.

Though the Judiciary Act contemplated a Supreme Court presiding over inferior tribunals, the Confederate Congress was still arguing over the constitution of the Supreme Court at the end of the war. As the Federal system of Circuit Courts was not taken over, this meant that the only tribunals to function were the District Courts. The judicial power conferred did not include the 'diversity' jurisdiction of the Federal courts, *i.e.*, jurisdiction over suits between citizens of different states, which, married to the theory that corporations are 'persons' within the meaning of the Fourteenth Amendment, has had such an important, and on the whole unprofitable, influence on company law in the United States. But in spite of these divergences, the Confederate judicial system was, by and large, a faithful reproduction of its Federal ancestor.

We get a good picture of the emergency legislation deemed necessary by the Confederate States from the details Mr. Robinson gives of cases coming before the Courts. The policy of confiscating the property of enemy aliens, sanctioned by the various Sequestration Acts, was responsible for much of the business of the Courts. The introduction of universal conscription in 1862 brought in its train numerous applications for *habeas corpus* 'by anxious parents in behalf of minors, and by adult slackers.' The crime of 'weakening the confidence of the people in the Confederate cause by word, deed or act' is a near relation to some of the offences created by our present-day Defence Regulations.

In the sphere of martial law proper, the Confederates started off with the usual system of *ad hoc* courts martial composed of officers superior in rank to the accused. In 1862 General Lee found this unsatisfactory, particularly because of the enforced absence from duty of the officers involved, and accordingly a system of permanent military tribunals was instituted. The innovation was a success, according to the 1863 report by the Secretary for War, Judah P. Benjamin, better known to English awyers as the author of *Benjamin on Sale*. There were remarkably few clashes between the courts and the military authorities, due partly to the spirited way in which the courts functioned even in the battle zones, and partly to the reluctance

of the Confederate Congress to suspend *habeas corpus* proceedings permanently Mr. Robinson remarks:—

> '. . . there can be no doubt that the efficiency of the executive branch of government was much lowered by the failure of Congress to grant it a continuous right to suspend constitutional guarantees.'

Lincoln, on the other hand, suspended *habeas corpus* proceedings without the consent of the Federal Congress and in the teeth of an adverse decision by Chief Justice Taney. He was thereby able to prevent the secession of Maryland and to repress Kentucky and Missouri. He realised the truth expounded by Scrutton L.J., 'that a war could not be carried on according to the principles of Magna Charta.'

There is little to add by way of criticism except to dissent from the author's views at p. 54 on the reasons for the success of the Common Law Courts in wresting jurisdiction over commercial cases from the Court of Admiralty in the seventeenth century. The book contains such a mass of facts that it is a tribute to the author's style that it can be read so easily. There is a leaven of interesting detail of which the following extract from a case of 1862 is typical:—

> 'After four witnesses had been heard for the prosecution, one of the jurors, "George A. Clarke being found in a state of intoxication, the Court determined to suspend the further trial of the cause until to-morrow morning at 10 o'clock and Ordered Mr. Clarke into the custody of the Marshal until that time."'

We are left to speculate whether the Court had been remiss in not noticing Mr. Clarke's condition earlier or whether he had been indulging in some surreptitious drinking during the opening part of the trial.

D. W. L.

The Law of Evidence. By Sidney L. Phipson, M.A. (Cantab.), of the Inner Temple, Barrister-at-Law. Eighth Edition. By Roland Burrows, K.C., Recorder of Cambridge, Reader in Evidence, etc. to the Inns of Court. London: Sweet & Maxwell, Ltd. 1942. clxxxviii and 678 and (Index) 770 pp. (£2 10*s.* net.)

A new edition of a treatise which Professor Wigmore describes as: 'The best book now current on the Law of Evidence in England,' could not have been entrusted to more competent hands than those of Dr. Roland Burrows, whose name is a guarantee of scholarship and critical analysis combined with the recognition of practical requirements. The admirable arrangement whereby decisions are set out in parallel columns according to their admissibility has been enhanced, for instead of appearing at the end of a chapter, they now follow immediately on the text they illustrate. A new and comprehensive chapter has been added on the Evidence Act, 1938, and the changes it entails are also dealt with in the relevant portions of many other chapters. The effects of some forty statutes passed since the last edition in 1931 are duly incorporated in the text and the case law is thoroughly up to date. It is worthy of note that a passage from p. 407 of the present edition was cited with approval by Hilbery J., in *Hollington* v. *Hewthorn & Co., Ltd.*, 1942, 86 Sol. J., 332. Few would disagree with the learned editor in his Preface, 'It is a matter for serious consideration whether . . . the subject of evidence ought not to be reconsidered with a view to securing that it shall better conduce to the only object that justifies its existence, viz., the due ascertainment of the truth in the administration of justice.' We hope that the expert knowledge of Dr, Roland Burrows will be available for this most desirable reform,

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Protection of Coastal Fisheries under International Law. By STEPHEN A. RIESENFELD. Washington: Carnegie Endowment for International Peace; Columbia University Press. 1942. xii and 296 pp. ($2.00.)

This is an unpretentious but able and sound monograph. The author is content with giving a picture—and it is a clear and scholarly picture—of the study of the subject by private scientific groups and international and national congresses, of the legislative, judicial and diplomatic practice of practically all States, and of the activities of international tribunals on the subject. The latter is treated rather summarily. In particular, the importance of the Behring Sea Arbitration both for international law in general and for the question of fisheries is such that it deserves fuller and more critical treatment than the author has been able to give it. The author's conclusions will probably command general assent although he does not make it quite clear whether the jurisdictional and protective rights of the coastal state are or whether they ought to form a rule of international law. The Carnegie Endowment of International Law deserves the thanks of the student for having assisted in the publication of a valuable and thoroughly competent piece of Research.

H. L.

Diplomatic Correspondence of the United States: Canadian Relations, 1784—1860. Vol. II., 1821—1835. Edited by W. R. MANNING, Ph.D. Carnegie Endowment of International Peace; Columbia University Press; International Document Service. xxxviii and 1016 pp. ($5.00)

The present volume is the second of the proposed four volumes covering the relations between the United States and Canada in the years 1784—1860. The importance of the entire series edited by Dr. Manning has been repeatedly emphasised in the previous issues of this *Journal*. The usefulness of this monumental undertaking increases progressively as its cumulative value in the field of international law and history becomes more apparent with each addition to the series. The present volume contains, *inter alia*, interesting contributions to the law relating to acquisition of title to territory by discovery, cession, purchase, occupation, and contiguity; to interpretation of treaties; to navigation on rivers; to fisheries; and to that interesting experiment of reduction of armaments on the Great Lakes.

H. L.

Principles of Mercantile Law. By J. CHARLESWORTH, LL.D., Lond., of Lincoln's Inn and the North-Eastern Circuit, Barrister-at-Law, Recorder of Pontefract. Fifth Edition. London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1942. xxxvi and 372 pp. (10*s.*)

The importance of mercantile law as a subject in the law schools is evidenced by some half dozen books on the topic. They are constructed on much the same pattern. There is a necessary and preliminary outline of the law of contract followed by a brief account of the various leading heads of mercantile law. Dr. Charlesworth's book is a sound and popular outline of the subject, though it is too short to comprise much discussion of the principles underlying the rules. In this edition the learned author has quite rightly referred to such temporary changes effected by emergency legislation as affect elementary rules in the sale of goods and in bankruptcy. The *Fibrosa Case* was reported too late for any account of it except

the slip inserted at p. 83. The reader should note that it is now accessible in [1943] A. C. 32. In the next edition a reference might be made to *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corporation, Ltd.* [1942] A. C. 154.

P. H. W.

The Government of Labour Relations in Sweden. By J. J. Robbins. Humphrey Milford; University of North Carolina Press, Chapel Hill. 1942. xii and 367 pp. (21*s.* 6*d.*)

In common law jurisdictions Labour Law has only recently begun to attract the attention of writers. Articles on the English Law of Labour Relations are rare. The reviewer remembers only an essay by Tillyard and Robson in (1938) 48 *Economic Journal*, pp. 15—25. Systematic works on the "labour contract" are still to come. Attention has been drawn to the relevant laws of France by Sobernheim and Rothschild in (1939) 37 *Michigan Law Review* 1025—1077, and of Germany by Wunderlich *Labour under German Democracy, Arbitration*, 1918—1933 (New York, 1940). Continuing this comparative treatment, Mr. Robbins describes in a scholarly study the law governing the Associations of Employers and Employees, the system of collective contracts and the special procedure of the Labour Courts in Sweden. He unfolds the remarkable story of a branch of law which was developed in Sweden by employers and workmen with the least possible interference on the part of the State. The book is not only valuable for its exhaustive treatment of a technical branch of the law. It testifies to the creative power of groups inside the State in elaborating new principles or even branches of law, subject only to the supervision of the supreme authority. The reader who bears in mind the analogies drawn by Professor Brierly, in the *Czechoslovak Yearbook of International Law* (1942), at pp. 9—11, between groups within a State and of States in the international community, will be attracted by the treatment, in Swedish Labour Law, of legal (jural) disputes and disputes involving questions of policy and interests (non-jural). If, as may be hoped, Labour Law will form in the near future the subject of detailed studies on the part of comparative lawyers, Mr. Robbins' book should serve as a valuable guide to the relevant laws of Sweden.

K. L.

International Law and Totalitarian Lawlessness. By Georg Schwarzenberger, Ph.D., Dr.Jur. London: Jonathan Cape. 1942. 168 pp. (10*s.* 6*d.*)

Dr. Schwarzenberger is to be congratulated on having undertaken the task of dispelling the myth that international law has broken down and that the present chaos is due to a world revolution. Such an attitude, as he points out, befits a defeatist. In a series of essays which, although knit together loosely, all serve to bear out one main proposition, the author elaborates his theme that international law is flexible enough to hold its own. The essay on 'International Law as a Weapon of Pre-Belligerent Warfare' is an excellent study of the use to which international law was put by the Nazi Government between 1933 and 1939 to further its own ends. In 'Neutrality and Totalitarian Aggression' Dr. Schwarzenberger refutes those who have suggested that the present trends in the law of neutrality are novel and that they illustrate the doom of international law. In reality, the emphasis has merely shifted from certain aspects particularly cherished in the nineteenth century to others which were less apparent during that period, but which nevertheless formed part of the law of nations from early times onwards. In 'Retribution for War Crimes' the author surveys exhaustively the

present law relating to war criminals with special regard to post-war solutions. 'The Totalitarian States as the International Outlaws' is a highly original attempt to apply the municipal law of outlawry to the relations with certain States which employ the methods of international gangsterism. The reviewer confesses that he found it difficult to estimate the legal, as distinct from the moral, implications if they are not to be identical with the propositions discussed in the preceding chapters. In municipal law, outlawry deprived a criminal of all rights and conferred specified new rights upon the community. Transplanted into the sphere of international law, it is not quite easy to perceive how this conception, which does not seem to imply the creation of new rights, differs in effect from that of reprisals. If, however, outlawry means the substitution of a less refined system of conduct for that generally in force between nations, the outlawed State could claim by right, as against a previous practice *de facto*, to apply this system with the result that by operation of law a reciprocal lowering of standards would ensue. The book, which is well documented, deserves a close study.

K. L.

Palmer's Company Law. Seventeenth Edition. By His Honour Judge Topham, LL.M., K.C., a Bencher of Lincoln's Inn. London: Stevens & Sons, Ltd. 1942. cxii and 720 pp. (30*s*. net.)

His Honour Judge Topham has undertaken sole responsibility for the new edition of this standard work which is designed for the lawyer and the business man. The merits and usefulness of *Palmer* are too well known to call for comment and the present edition maintains the high reputation of its predecessors. It has not called for many important changes in the statement of the law or practice; outstanding decisions have been few in recent years but the leading case of *Knightsbridge Estates Trust, Ltd.* v. *Byrne* [1940] A. C. 613 receives the attention it deserves on the two important points it decides. The book is up to date in every way, the emergency legislation and the most important cases thereon are carefully and adequately dealt with in the text.

Tragedy at Law. By Cyril Hare. London: Faber & Faber, Ltd. 1942. 290 pp. (7*s*. 6*d*. net.)

This is a detective story without a legal flaw; a well-planned murder and a most ingenious point of law. It is based on the circuit life of Mr. Justice Barber—who forgot to insure his car, and his wife Hilda who did not forget a vital sub-section of the Law Reform (Miscellaneous Provisions) Act, 1934, and the case of *Daniels* v. *Vaux* [1938] 2 K. B. 209. We warmly recommend it.

The Theatre of the Basoche: A Contribution of the Law Societies to French Mediaeval Comedy. By Howard Graham Harvey. Harvard Studies in Romance Languages. Vol. XVII. London: Humphrey Milford; Cambridge, Mass.: Harvard University Press. 1941. vi and 255 pp. (16*s*. 6*d*. net.)

Professor Harvey has succeeded in writing a stimulating book on the legal background of the plays performed by the societies of the law clerks in France. He shows that the principal aim of their farces was not to criticise the legal profession as a whole, but to expose the ignorance, inefficiency and greed of the

judges and legal practitioners in the seignorial and ecclesiastical courts, as compared with the high standards maintained in the royal courts. The position of judges, lawyers and officials, the law and procedure of the fifteenth and sixteenth century are discussed in the light of the contemporary theatre. The reviewer is not qualified to pass judgment on the literary aspects of this study, but he has obtained much interesting and useful information on the state of the law in France between 1450 and 1550, even if he cannot always agree with the author's interpretation of the legal questions raised in the plays. As the French legal system of the fifteenth century was still closely related to its counterpart on the other side of the channel, common lawyers and civilians alike will derive much pleasure from the study of this well-written book. One would like to see more works of this kind.

K. L.

Brief Life. By Cecil Whiteley, K.C., D.L., The Common Serjeant. London: Macmillan & Co., Ltd. 1942. xiii and 218 pp. (10*s.* 6*d.* net.)

This is a collection of random reminiscences of one who practised at the Crimina Bar for thirty years, and administered the criminal law as Recorder, Chairman of Quarter Sessions and as a Judge at the Old Bailey. The chapters are a mixed bag,—licensing justices, sensational cases, stories in court, clubs, advocacy, capital punishment, etc.—enlivened with personal anecdotes. In Trial by Jury he considers whether juries could not now be dispensed with except in treason and murder, and illustrates classes of cases where they do not ' a true verdict give according to the evidence.' In Chapter XIV he favours the stipendiary over the lay magistrate and concludes that clerks of the justices should be whole time appointments, while the chairman of the bench should be well qualified. The chapters on Probation, Borstal, Corporal Punishment and Sentence are valuable to every magistrate. At p. 195 he sets out the provisions for a short statute ' making it impossible to commit bigamy.'

The book is full of interest for layman and lawyer, and has constructive suggestions for improving the administration of criminal law.

T. E. L.

The Conveyancers' Year Book, 1942. By Sir Lancelot H. Elphinstone, of Lincoln's Inn, Barrister-at-Law. Vol. III. London: The Solicitors' Law Stationery Society, Ltd. 1942. xxviii and 312 pp. (25*s.* net.)

This is a digest of the cases, statutes, orders and regulations for the year 1941. Under some seventy main headings they are conveniently arranged in alphabetical order from Agents to Wills. References are given for noting up in the appropriate pages of the standard text-books and books of precedents. There are also references to articles and notes in the *Law Quarterly Review*, *Solicitors' Journal*, *Rating and Income Tax*, *Law Society's Gazette*, *Law Revision Committee Report* and the *Cambridge Law Journal*. The summaries of cases and statutes, and the notes and comments thereon, are extremely well done—some of the long statutes are brilliant models of compression and clarity. We note an unfortunate slip at p. 159 in stating the effect of *Portman* v. *Roskill & Sons* [1941] 1 All E. R. 226. There is a comprehensive cumulative index to the three volumes. For keeping up to date in the wide fields of Conveyancing there is no better book.

T. E. L.

An Outline of the Law of Landlord and Tenant. By A. M. WILSHERE, M.A., LL.B., Barrister-at-Law. Second Edition. London: Sweet & Maxwell, Ltd. 1942. x and 118 pp. (6*s.* 6*d.* net.)

This is a well arranged and an accurate outline of the common law principles which govern the relationship of landlord and tenant and of the main modifications introduced by the complicated mass of statutory provisions such as the Rent and Mortgage Interest Restrictions Acts, to give but one example. It is a book written for students and admirably meets their requirements.

T. E. L.

The Northern Ireland Legal Quarterly. No. II., Vol. V. Nov., 1942. Editors: JAMES R. LINDSAY; ROBERT A. RUTHERFORD. Printed and Published by J. S. Scarlett & Son, Ballycastle, N.I.

We welcome this number of our contemporary and recommend particularly for the English reader the articles on ' British Nationality and Irish Citizenship ' (F. H. Newark) and ' Law in Eire,' Other contributions are ' Killed in War Reliefs from Death Duties ' (R. E. M'Neilly) and ' The New Capitulations ' (J. A. Coutts). There are also notes on ' Recent Legislation in Northern Ireland ' and ' Recent Case Law ' and ' Costs of Preliminary " Letters of Warning " to Debtors.' The notes on the *Fibrosa Case* and on *Hay* (or *Bourhill*) v. *Young* are outspoken in their criticisms, but if they go farther than we should be inclined to do they are none the less useful as *stimuli* to discussion.

P. H. W.

The Old House. By MALCOLM LETTS. London: Frederick Muller, Ltd. 1942. 67 pp. (5*s.*)

No. 8, Bartletts Buildings, Holborn, disappeared as the result of enemy activity in 1941. It was built in 1685 and this is a brief history of it and of three generations of solicitors who inhabited it from 1833 until its destruction. The author is the third in descent and the book is of interest to lawyers for its account of the changes that have taken place in the profession since his grandfather's time. It should also be attractive to laymen as a sketch of the life of a professional man in the Victorian era,—the age of families of ten or more children; of fathers who expected and exacted the respect of their offspring but rarely gained their confidence; of family prayers; of weekly baths; of moustache cups; of an income tax bitterly resented and ludicrous in amount to us. In some aspects it was a life spacious, sleepy and comfortable, in others it was hard and narrow. With the advent of the internal combustion engine it passed for ever.

P. H. W.

A Permanent United Nations. By AMOS J. PEASLEE. New York: G. P. Putnam's Sons. 1942. x and 146 pp. ($1.50.)

Mr. Peaslee is a practising lawyer with considerable experience in international law and organisation. In the present volume he presents a collection of essays on various aspects of international government as published between 1916 and 1942. The author favours a strong world government while maintaining at the same time the sovereignty of nations. However, it is difficult to ascertain how the author intends to reconcile the two conflicting forms of government in practice.

The last four years have witnessed on this side of the ocean the growth of a considerable literature on the future structure of the international society. It is interesting to observe that the same problems are attracting attention in the United States.

K. L.

English Political Pluralism. By HENRY MEYER MAGID. New York: Columbia University Press; London: Humphrey Milford. 1941. 100 pp. (8*s.* 6*d.* net.)

This is a lucid study of the political theory of pluralism, the theory that aims at emphasising the importance of groups within the state at the expense of the state itself. The theories of Figgis, Cole and Laski are carefully analysed, and are made the basis of the author's own conclusions.

G. L. W.

Local Government Law in a Nutshell. By RALPH MILLNER, M.A. (Cantab.), of the Inner Temple and Midland Circuit, Barrister-at-Law. London: Sweet & Maxwell, Ltd. vi and 184 pp. (6*s.* 6*d.* net.)

This is a well-arranged and useful summary of the standard books on this difficult and all-embracing subject. It is based on the peace-time law of local government, but attention is drawn to the most important provisions of war-time legislation in an appendix of six pages.

Also received:—

Temple University Law Quarterly. Published by Temple University School of Law, Philadelphia. 1941, Vol. XVI, No. 1; 1942, Vol. XVI, No. 4. ($2.00 a year.)

Cat & Mouse. The repeated prosecution of conscientious objectors. Central Board for Conscientious Objectors, 6, Endsleigh Street, London, W.C.1. 1942. 23 pp. (6*d.* net.)

International Aspects of European Expropriation Measures. By MARTIN DOMKE. American Foreign Law Association, Proceedings No. 22. 1941. 5 pp. An address dealing with the effects abroad of devaluation of currencies and sequestration of private assets as carried out by Germany in the course of veiled expropriation measures.

Bractonian Problems. By H. KANTOROWICZ, M.A. With a short memoir of the author by DORIS M. STENTON. Glasgow: Jackson, Son & Co. 1941. 133 pp. The reviewer of this book is in America and his review will not be available until the next issue of *The Cambridge Law Journal.*

The Judicial Function in Federal Administrative Agencies. By JOSEPH P. CHAMBERLAIN, Professor of Public Law, NOEL T. DOWNING, Nash Professor of Law, PAUL R. HAYS, Associate Professor of Law. New York: The Commonwealth Fund. 1942. xii and 258 pp. (16*s.* 6*d.*)

The following arrived too late, but will be reviewed in the next issue:—

Limitation of Actions. By *the late* C. H. S. PRESTON and G. H. NEWSOM. Second Edition by G. H. NEWSOM, of Lincoln's Inn, Barrister-at-Law, London. The Solicitors' Law Stationery Society, Ltd. 1943. xlviii, and 318 pp. (40*s.* net.)

The Law of Nations. An introduction to the International Law of Peace. Third Edition. By J. L. BRIERLY. Oxford University Press. 1942. viii and 272 pp. (6*s.* net.)

The Law of Property in Shakespeare and the Elizabethan Drama. By PAUL S. CLARKSON, A.B., LL.B., and CLYDE T. WARREN, A.B., LL.B. Baltimore: The Johns Hopkins Press. London: Humphrey Milford; Oxford University Press. 1942. xxvii and 346 pp. (21*s.* 6*d. net.*)

Plans for the World Peace through Six Centuries. By SYLVESTER JOHN HEMLEBEN, Head of the Department of History and Social Studies School of Education, Fordham University, The University of Chicago Press. London: Cambridge University Press. 1943. xiv and 227 pp.